

**QUARTERLY REPORT**  
**Of the**  
**ATTORNEY GENERAL**  
**Of**  
**ALABAMA**

**For the Period**  
**January 1, 1944**  
**Through March 31, 1944**  
**Volume XXXIV**

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**TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:**

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from January 1, 1944, through March 31, 1944.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,

**WILLIAM N. McQUEEN,**

**Acting Attorney General.**

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**1944**

# OPINIONS



January 7, 1944.

Hon. J. M. Stauffer,

State Forester,

Division of Forestry,

State Department of Conservation,

Montgomery, Alabama.

Subdivision 12, Subsection XIII of Section I, General Appropriation Act of 1939 (General Acts, 1939, p. 411) appropriating monies for the purchase of lands in Calhoun County to connect Fort McClellan with the National Forest—Awards made in condemnation proceedings for purpose of acquiring lands to connect Fort McClellan with the National Forest may be paid into court on regular vouchers of Division of Forestry of the Department of Conservation.

Opinion by Assistant Attorney General Savage.

Dear Sir:

Your request for an official opinion, bearing date of December 31, 1943, is as follows:

"In connection with the purchase of the corridor between Fort McClellan and the Talladega National Forest it was necessary to institute condemnation proceedings in order for the State to acquire six parcels of land which were necessary in order to complete the corridor. The case was tried before Hon. S. E. Boozer, Judge of Probate of Calhoun County, who appointed three commissioners to inspect the lands to be condemned and give them a fair and equitable appraisal. Four of the landowners have filed an appeal on the valuations set up by the commissioners, while the State has appealed the valuations placed on two of the parcels.

"It appears desirable at this time to pay into the court the amount of the appraisals placed on the four properties by the commissioners since the valuations which they have placed on the properties are not inconsistent with previous appraisals made by the Division of Forestry of the Department of Conservation. Incidentally, these four parcels of land are the ones for which the owners have submitted an appeal to the circuit court.

"We shall appreciate your advising us what steps we can take to legally pay into the court the appraised valuations which have been placed on four of the properties. This matter was discussed with Mr. I. C. Heck, State Comptroller, and he suggested that an opinion be requested of your office so that he will be free of any liability in connection with the issuance of the State warrants paid into the court.

"We shall appreciate your advising us in connection with this matter at your earliest convenience."

Your attention is directed to an opinion of this office to Hon. A. R. Forsyth, dated May 5, 1941, who was then Director of Finance (Quarterly Report of Attorney General, Vol. XXIII, page 121), dealing with the appropriation made by the Legislature for the purchase of land in Calhoun County, Alabama, to connect Fort McClellan with the National Forest. You will note that such opinion held that the appropriation in question should be released to the Department of Conservation, Division of Forestry, and administered by said Department for the purpose of purchasing land in Calhoun County, Alabama, to connect Fort McClellan with the National Forest. This appropriation is found in Subdivision 12, Subsection XIII, of Section 1, General Appropriation Act of 1939, General Acts 1939, page 411.

You inquire as to what steps you may take to legally pay into court the awards made by the Commissioners for the property condemned. It is my opinion that this may be done by drawing a regular voucher of the Department of Conservation on the State Treasury, letting such voucher show, of course, that the item is to be charged to said appropriation and that it is in payment of awards made in condemnation proceedings instituted for the purpose of acquiring lands to connect Fort McClellan with the National Forest. The State warrant should be made payable to S. E. Boozer, Judge of Probate Court of Calhoun County, Alabama.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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January 13, 1944.

Miss Ethel R. Hawley,

Acting Director,

Bureau of Vital Statistics,

Health Department,

Montgomery, 4, Alabama.

State Health Department—Bureau of Vital Statistics—Bastardy—  
Act No. 492, General Acts of Alabama 1943, page 454.

1. An erroneous statement as to the name of the father on a birth certificate is such an error of fact that may be corrected by an affidavit which affidavit shall be attached to the original birth certificate.

2. Child born of a married mother is presumably legitimate.

Opinion by Assistant Attorney General Hawkins.

Dear Madam:

Your request for an official opinion bearing date of December 14, 1943, is as follows:

"We have had several cases lately where a birth certificate has been turned in showing the parents married, later the mother has attempted to file an affidavit stating that the person stated on the birth certificate was not the father of the child. We are enclosing copies of the birth certificate and the affidavit in one of these cases.

"Our records show that Joe Murray and Rosa Lee Anderson were married at Brent, Alabama on October 6, 1940. This marriage record is found in Volume 48, Page 23632 of our 1940 series. Is it possible to make such changes in our records by affidavit only, or should paternity of the child be determined by the courts? This is probably a preliminary step for claiming someone else as father of the child in order to secure Government compensation.

"In today's mail some more questions came up in regard to illegitimate children. The mother had given the hospital authorities a fictitious name and a birth certificate is filed for her son in this name. A month after the child was born the mother married the reputed father of the child pursuant to an understanding that the marriage was to legitimate the child and give it the name of the father. A few years later the mother and father were divorced but the mother has, without any interruption, used her married name and the boy has always used the name of his reputed father. The boy now wishes to enter the armed service and it is necessary that the birth certificate be corrected. Is there any way that this can be done if it is impossible to get in touch with the divorced husband of the mother and secure an acknowledgement of paternity?

"The second question has to do with filling out a birth certificate where the mother is married but the husband is not the father of the child. In some of these cases, the question 'Is mother married' is answered 'yes', the maiden name of mother is given, the child's surname is shown as that of the husband and the father's name omitted. In other cases, the name of the putative father (not the husband) is shown. In still other cases, the name of the husband is given as the father even though the mother states that he is not. This latter method would seem to have some legal basis, since I am under the impression that a child born to a married woman is legally regarded as the offspring of husband and wife."

In answer to your first inquiry, it is my opinion that when it appears from a birth certificate recorded in your office that the parents were married, the mother may subsequently file an affidavit stating that the person named on the birth certificate as father of the child was not the father.

Section 10 of Act No. 492, General Acts of Alabama of 1943, page 454, 461, provides in pertinent part as follows:

"Where it is found that an error of fact was made in the entry of personal particulars on records filed with the state registrar, an affidavit for corrections of the record shall be filed with the state registrar in such form as the state board of health may prescribe. Said instrument in writing shall be attached to and made a part of the record concerned. The probative value of any appended correction to an original certificate shall be determined by the judicial or administrative body or official before whom the certificate is offered as evidence."

Therefore, inasmuch as the entry on the birth certificate designating the mother's husband as the father was apparently an error of fact, such error may be corrected by an affidavit which shall be attached to and made a part of the birth certificate.

Your second inquiry, concerning a situation wherein the unmarried mother gave a fictitious name on the birth certificate and having subsequently married the reputed father of the child now wishes to correct the original birth certificate even though the reputed father is not available, is also answered by the above quoted part of Section 10. This appears to be an error of fact which under this statute may be corrected by an affidavit which shall be attached to the original birth certificate. That the error of fact consisted of misrepresentations or intentional mistake is of no consequence.

However, in regard to both of the above inquiries, it should be noted that the attachment of such affidavits to the original birth certificates is not conclusive proof of their truthfulness or correctness. The latter portion of the above quoted part of Section 10 expressly states that the probative value of any such correction shall be determined by any judicial or administrative agency before whom the birth certificate, together with the appended affidavits, is offered as evidence. The legislative intent of this statute is to vest the Bureau of Vital Statistics with authority to accept affidavits to correct errors of fact in original birth certificates. However, the duty to determine the correctness of such affidavit has not been imposed upon the Bureau.

In answer to your third inquiry regarding the legitimacy of a child whose mother is married but who states that her husband is not the father of the child, the courts have long adhered to the common law rule that a child born of married parents is presumably legitimate, such presumption being rebuttable only by the introduction of sufficient evidence to conclusively overcome it.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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January 13, 1944.

Hon. Ben C. Morgan, Director,  
Department of Conservation,  
Capitol.

Department of Conservation—Title 8, Sections 144 and 145, Code of 1940.

1. By virtue of Title 8, Section 144, Code of 1940, all persons transporting oysters or shrimp by motor vehicle for commercial purposes are subject to the license.

2. Title 8, Section 145, Code of 1940, does not subject to a license persons transporting oysters or shrimp into the State, but is applicable to persons transporting oysters or shrimp out of the State, and to certain persons engaged in selling or offering for sale oysters or shrimp.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of November 26, 1943, is as follows:

"I would appreciate your opinion on Section 144 and 145 of Title 8, 1940 Code of Alabama, regarding the following questions:

"1. Is it necessary under the law for a truck transporting oysters or shrimp for commercial purposes into the State of Alabama, to have a \$5.00 license as set out in this Section?

"2. Does Section 145 interfere with interstate commerce by demanding a license from each truck that delivers oysters or shrimp into the State, if sales are made prior to date of delivery.

"3. If a firm, say in Chicago, Ill., buys a \$50.00 nonresident license according to Section 145 to transport shrimp or oysters into the State, must this license accompany each truck coming into the State? Some trucks are sent in by such firms and claim that the agent of that firm has purchased license when the said truck would have the name of another firm and War Manpower certificate made out to the truck in the name of the parties whose name was on the truck but who may be delivering as agents, oysters and shrimp for another concern other than the one as shown by the name printed on the truck.

"In other words, can we enforce on interstate commerce Section 145 by making each and every truck that comes into the State delivering

oysters and shrimp buy a \$50.00 license regardless of who they are delivering for, or regardless of whether the sale was made prior to date of delivery."

In answer to your first inquiry, it is my opinion that any person, firm, corporation, or association transporting by truck oysters or shrimp into the State of Alabama for commercial purposes must have the \$5.00 license required under the provisions of Title 8, Section 144, Code of 1940. This statute levies a license upon the "transporting or hauling by means of any motor truck or other motor driven vehicle raw oysters or raw shrimp for commercial purposes" and does not purport to be inapplicable to trucks coming into the State of Alabama for such purposes.

In answer to your second inquiry, your attention is directed to the terminology of Title 8, Section 145, Code of 1940, which is as follows:

"§ 145. Licenses to non-residents.—Before any person, firm, corporation or association or his or its agent shall be permitted to transport by land any raw oysters or raw shrimp for commercial purposes **beyond the boundaries of the State of Alabama** or sell or offer for sale oysters or shrimp within this state, and who has not been a bona fide resident of the State of Alabama for twelve months then passed shall be required to make application to the department of conservation accompanied by a fee of fifty dollars and upon approval by said department shall be issued a license to engage in such business. Such license shall be dated and shall be effective only for the season issued." (Emphasis added.)

This statute does not purport to levy a license upon the delivery of oysters or shrimp into the State of Alabama; rather such license is levied upon the transportation by land of oysters and shrimp **beyond the boundaries of the State of Alabama** and upon certain persons selling or offering for sale oysters or shrimp within the State of Alabama. Therefore, inasmuch as Section 145 is inapplicable to the delivery of oysters or shrimp into the State, it, of course, does not interfere with interstate commerce.

In view of the conclusion reached in answering your second inquiry, it is unnecessary to answer your third inquiry.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

January 15, 1944.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

Department of Finance,

Montgomery, 4, Alabama.

Municipalities—City Recorders—Fines—Fine and Forfeiture Fund  
—Costs and Fees—Title 37, Sections 582-600, Code of 1940—Title 15,  
Section 392, Code of 1940, Title 36, Sections 2, 53, Code of 1940—

1. The fine collected from a defendant convicted in a City Recorder's Court for a state offense should be remitted to the county fine and forfeiture fund, unless a contrary disposition is expressly provided by law.

2. Costs collected in such cases accrue to the municipality.

3. A fine for the violation of Rules of the Road imposed by a City Recorder should be remitted to the State Treasurer to be covered into the Highway Patrol Fund.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion bearing date of December 22, 1943, is as follows:

"I thank you for your prompt attention to my letter of December 20th which you answered under date of December 21st. In further connection with some of the questions asked in my letter, some of which necessarily require much research and time for your consideration, I am re-

submitting the following, slightly reworded.

"In connection with an examination now being made of the records of the City of Pritchard, we need your advise on the following. These questions are in relation to a City Recorder trying State charges.

"1. When a fine and costs are assessed and collected under a conviction for violation of a State law, should both the fine and costs be remitted to the State and/or county as their interests appear? (See Vol. 19, P. 74)

"2. Case No. 6234. Julius Smith. State charge of D. W. I. Fined \$100.00 and costs of \$4.75, Total \$104.75. Fine and costs collected and remitted to city. Should not the fine have been remitted to Highway Pa-

trol? Should the \$4.75 costs have been remitted to Highway Patrol? Costs were not itemized and a Highway patrolman did not arrest or appear as witness)

"3. Case No. 431. Charlie Hilliard. State charge, Carrying Pistol without Permit. Fined \$1.00 and costs of \$4.75, total \$5.75. Fine and costs collected and remitted to City. Should not the fine have been remitted to the County? Should the \$4.75 costs have been remitted to the County?

"4. Case No. 1207. Ernest Christian. Violation Sec. 3199, Code of 1923. (Title 14, Sec. 17, Code 1940. Affray.)

"On March 13, 1943 sentenced to 30 days in County jail. On March 15, 1943 re-arraigned, and fined \$25.00 plus costs of \$4.75, or 30 days hard labor for City. Fine and costs paid and remitted to City Treasury. (Offense never changed to a city charge.) Should not the fine have been paid to the County? Should not the costs have been paid to the County?

"(We see no authority by local law or ordinance allowing the taxing of costs in this Recorders Court.)"

In answer to your first inquiry, it is my opinion that a fine collected under a conviction of a defendant in a recorder's court for a State offense, unless otherwise provided by law, should be remitted to the fine and forfeiture fund of the county in which the defendant is convicted. However, the costs collected in such case should not be remitted to the fine and forfeiture fund of the county.

A fine has been defined in 15 Am. Jur., page 182, as "a sum of money exacted of a person guilty of an offense as a pecuniary punishment." Under the common law all fines arising from convictions for criminal offenses became vested in the State, and unless the State, through its Legislature, has directed a different disposition thereof, this common-law rule must still obtain.

Title 37, Sections 582-600, Code of 1940, those statutes creating recorders' courts and defining the jurisdiction thereof, empower such courts with jurisdiction over misdemeanors under the laws of the State, but nowhere is there any provision for the disposition of fines collected in such cases. Therefore, in the absence of any statutory authority, municipalities are not entitled to the fines collected from persons convicted in recorders' courts for State offenses.

Unless the statute creating an offense directs otherwise, the disposition of any fines collected for the violation of a State offense must be governed by Title 15, Section 392, Code of 1940, which provides as follows:

"§ 392. Fines to go to county, and judgment accordingly.—All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county."

Apparently it was the legislative intent that fines collected for violations of the criminal laws of the State shall accrue to the fine and forfeiture fund of the county. This conclusion is supported by the case of *State vs. Town of*

**Springville**, 220 Ala. 286, 175 So. 387, in which the Supreme Court of Alabama held that when a city recorder convicted a defendant for the violation of a criminal law of the State, the fine should go into the county fine and forfeiture fund unless otherwise provided by law.

However, it is my opinion that costs collected in such cases are not required to be remitted to the county fine and forfeiture fund. Costs are no part of the fine actually imposed (15 Am. Jur. p. 182); rather the theory upon which costs are assessed is the acquisition of a sufficient sum to compensate officers and the witnesses for the duties performed by them. It would seem proper, therefore, for the municipality to retain costs for these purposes. This would be true even if the officers were on a salary basis.

Your second inquiry concerns a case wherein the defendant was convicted in a recorder's court on a charge of driving while intoxicated, such charge being made presumably under the provisions of Title 36, Section 2, Code of 1940. The fine collected from the defendant in this case under the requirements of Title 36, Section 53, Code of 1940, should have been remitted to the State Treasurer within thirty days after its collection and credited to the Highway Patrol Fund. The said Section 53 provides for the remittance of all fines collected from persons convicted of a misdemeanor for a violation of those offenses set forth in Chapter 1, Title 36, commonly known as the Rules of the Road. This section however is not applicable to other State offenses.

In regard to the costs collected in this case, it is my opinion that there is no requirement that they be remitted to the State; rather the conclusions reached in answering your first inquiry are applicable to the costs in this case.

Inasmuch as your third and fourth inquiries concern the State offense of carrying a pistol without a permit and engaging in an affray, and as the statutes pertaining to such offenses do not provide for the disposition of fines therefrom collected, the answer to your first inquiry is here applicable.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

January 18, 1944.

Hon. E. P. Russell, Director,

Corrections and Institutions Department,

Capitol.

Determination of the sum to which a discharged convict is entitled (so called "go-free money") under the provisions of Title 45, Section 55, Code of 1940.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, dated January 10, 1944, is as follows:

"We respectfully submit two exhibits, A and B, of routine of Kilby Prison paying discharged prisoners their go-free money:

"Exhibit A: Terrell Dennis, white, No. 45878, Jefferson County, Date Committed: 5/31/41, Date Released: 9/18/43. Paid discharge money three years, five months, eighteen days, \$20.00. Under the heading 'Remarks' on discharge certificate, the Warden has made the following notations. This man served one year, five months and eighteen days on term No. 43050, for which he will receive \$10.00. He has served two years on term No. 45787, and will also receive \$10.00 on this sentence. He escaped on term No. 43050 and did not receive any discharge money, as he was brought back on escape and a new term.'

"Exhibit B: Andrew Tulley, white, No. 36043, Jefferson County, Date Committed: 11/3/36, Date Released: 9/16/43, Under the heading 'Remarks' on discharge certificate, the Warden has made the following notations: 'As Andrew Tulley this man completed term No. 30227 by serving four years and seven months. He then started a new term No. 36043, for which he is now being paroled pending good behaviour. He was paid seven years, ten months and twenty-three days, \$16.00.'

"You will note from the information furnished in the two different discharges of the two different prisoners, that this routine of paying them go-free money was used, therefore, one or the other must be wrong.

"Will you kindly render us your opinion as to the above."

I am unable to reconcile the sum awarded either convict with the statutory provisions. In the case of Terrell Dennis, the total time served was less than five years. He was, therefore, entitled to only Ten Dollars. Andrew Tulley was committed November 3, 1936, and discharged September 16, 1943. It, therefore, appears that this man has served only six years, ten months and a few days; and was, therefore, entitled to Fourteen Dollars.

Permit me to call your attention to the provisions of Sections 54 and 55, Title 45, Code of 1940, which are as follows:

"§54. Convict provided with clothing and money when discharged.—Each convict, at the expiration of his term of confinement, must be discharged from the penitentiary, and must be furnished with a decent suit of clothes and with money to enable him to reach his destination, not exceeding ten dollars; but if any convict is sick at the time his term expires, he must not be discharged except at his own request. If such convict is charged with the commission of any other criminal offense, he must be delivered to the proper sheriff or officer to answer such charge."

"§ 55. Additional cash payment to convicts on discharge.—In addition to the cash transportation and supplies to be furnished to state convicts upon their lawful discharge from penal servitude, as now required under existing laws, there shall be allowed and paid to each such convict whose term does not exceed five years, the sum of ten dollars in cash, and to each such convict whose term exceeds five years, the sum of ten dollars plus an additional sum in cash at the rate of two dollars per annum for each additional year, or fractional part of a year of said additional allowances and payments are made under existing laws."

A careful search fails to disclose any judicial interpretation of the applicability of the statute to the situation outlined in your letter. However, it appears obvious that the sole purpose of the Legislature in enacting the quoted statutes was to provide a released convict with some means of subsistence, even if for a limited time, to enable him to obtain a legal means of livelihood rather than to release him penniless and probably force him immediately to resort to criminal means to live. Realizing also that the longer a man was confined to the penal institution, the longer it would require him to readjust himself to freedom, or obtain a means of remuneration, the Legislature provided for a large sum of "go-free money" for a convict serving a period longer than five years. Considering the end the Legislature sought to accomplish, and also the fact that the statute referred to the period of confinement as "penal servitude," I am able to reach only the conclusion that where the word "term" is used in the quoted statutes, it refers to the term of penal servitude, and not to the term or terms for which the convict may have been sentenced.

As an illustration, let's assume that Convict "A" was convicted for five separate offenses, and sentenced to a term of one year each, the sentences to run consecutively; Convict "B" is sentenced to a term of one year in each of five separate cases, the sentences to run concurrently; Convict "C" is sentenced to a five year term for one offense. It can hardly be contended that upon his discharge Convict "A" would be entitled to five suits of clothes and fifty dollars at the end of five years servitude; or that Convict "B" would be entitled to the same at the end of one year; while Convict "C" would be entitled to one suit of clothes and Ten Dollars at the end of five years. However, such would result if we considered the completion of each sentence as a separate "term." In the above illustrated cases each convict has served only one "term of penal servitude or confinement" within the contemplation of the quoted statutes; therefore, upon his discharge each should receive one suit of clothes and Ten Dollars.

The length of servitude should be computed from the date the convict is committed to the date of his legal discharge, deducting therefrom any time for which the convict does not receive credit against his sentence. As an illustration of this, a convict was committed on January 1, 1930; on January 1,

1932, he escaped; on January 1, 1934, he was returned to prison; on January 1, 1940, he was legally discharged. The period from the time he was committed to the time he received his lawful discharge was ten years; however, for two years during the interim he was a fugitive from justice; therefore, the term of his penal servitude was eight years, and for this the convict is entitled to Ten Dollars for the first five years, Two Dollars for each year in excess of the first five, or a total of Sixteen Dollars.

Following the above method for determining the actual period of penal servitude, it is my opinion that discharged convicts are entitled to the following:

When the period of servitude is:

|                                                                            |         |
|----------------------------------------------------------------------------|---------|
| Less than five years and six months .....                                  | \$10.00 |
| Five years and six months, but less than six years and six months .....    | 12.00   |
| Six years and six months, but less than seven years and six months .....   | 14.00   |
| Seven years and six months, but less than eight years and six months ..... | 16.00   |
| Eight years and six months, but less than nine years and six months .....  | 18.00   |
| Nine years and six months, but less than ten years and six months .....    | 20.00   |
| Ten years and six months, but less than eleven years and six months .....  | 22.00   |

For longer periods of servitude, add Two Dollars for each full year in excess of eleven years and six months. In each case the discharged convict, in addition to the above, is entitled to a suit of clothes and transportation fare, the latter not to exceed Ten Dollars.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.



January 19, 1944.

Mrs. Edwina Mitchell,

Associate Member,

Board of Pardons and Paroles,

Montgomery, Alabama.

Pardons and Paroles—Prisoners—Title 42, Section 12, Code 1940.

A parolee, who has been declared delinquent and is reinstated upon a hearing on such declaration, does not lose credit for service of time between declaration of delinquency and reinstatement of his parole.

Opinion by Assistant Attorney General Hawkins.

Dear Madam:

Your request for an official opinion, bearing date of December 16, 1943, is as follows:

"We regret that it seems necessary to call on you for so many opinions.

"The question has been raised as to whether or not one, who has been paroled, declared delinquent, and after a hearing on delinquency is reinstated, loses credit for service of the time between the declaration and the reinstatement. Is the reinstatement retroactive insofar as credit on sentence is concerned?

"It sometimes happens that a man is lost through misunderstanding or illiteracy and a warrant for his arrest is issued on a declaration of delinquency. After he is apprehended we find that there was no intention on his part to violate parole conditions. He is reinstated and we feel should be given credit for the service of the sentence from the date of the declaration of delinquency to the time of reinstatement. We are doubtful, however, whether or not this interpretation could properly be given to the statute and shall appreciate your advice."

It is my opinion that a parolee, who has been declared delinquent and is reinstated after a hearing on such declaration, does not lose credit for service of the time between the declaration of delinquency and the reinstatement of his parole.

This conclusion is reached by an interpretation of Title 42, Section 12, Code of 1940, which is as follows:

"§ 12. Delinquent prisoners; parole courts.—Whenever there is reasonable cause to believe that a prisoner who has been paroled has violated his parole, the board at its next meeting shall declare such prisoner to be

delinquent and time owed shall date from such delinquency. The warden of each prison shall promptly notify the board of the return of a paroled prisoner charged with violation of his parole. Thereupon, such board shall, as soon as practicable, hold a parole court at such prison or at such other place as it may determine, and consider the case of such parole violator, who shall be given an opportunity to appear personally or by counsel before such board and produce witnesses and explain the charges made against him. The board shall within a reasonable time act upon such charges, and may, if it sees fit, require such prisoner to serve out in prison the balance of the term for which he was originally sentenced calculated from the date of delinquency or such part thereof as it may determine."

Although the first sentence of the above quoted section authorizing the issuance of a declaration of delinquency provides that the time owed by the prisoner "shall date from such delinquency," this section by further providing for a hearing to determine whether the prisoner was in fact delinquent and by authorizing the Board of Pardons and Paroles to require the prisoner to serve in prison the balance of the term for which he was sentenced calculated from the date of delinquency, or such portion of the term as it may determine, indicates that the Legislature intended such forfeiture to be effective as of the date of the declaration of delinquency only upon a finding of fact that the prisoner was actually delinquent. Thus the term "time owed shall date from such delinquency" contemplates a determination of actual delinquency at the hearing.

Therefore, when the Board of Pardons and Paroles, having determined that a parolee had no intention of violating the conditions of his parole, or in fact had not done so, reinstates his parole, he is in the same status as if the declaration of delinquency had never been made, and he loses no credit for service of time.

Yours very truly,

WILLIAM N. McQUEEN.

Acting Attorney General.

January 20, 1944.

Hon. O. L. Andrews,

Clerk, Circuit Court, Jefferson County,

Birmingham, Alabama.

Constitutionality—Highway Patrol—Funds—Jefferson County—Act No. 171, General Acts of Alabama 1943, p. 157—Section 105, Constitution of 1901.

Act No. 171, General Acts of Alabama 1943, p. 157, which provides that the fines, forfeitures, and costs collected for traffic violations shall go to the general fund of the county in all counties having 300,000 or more population, being a general law, does not violate Section 105, Constitution 1901.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of December 31, 1943, is as follows:

"On October 20th, 1943 you rendered an opinion to Mr. Ben P. Singleton, Chief Examiner of Accounts, declaring Senate Bill No. 365, passed by the 1943 Legislature, unconstitutional. Please render an opinion on Bill No. 171, House Bill No. 441, approved July 17th, 1943, as to whether or not this is unconstitutional, and if under this law should the fines be paid into the County Treasury where someone other than the Highway Patrol men make the arrests.

"Thanking you so much for your prompt attention to this matter."

It is my opinion that Act No. 171, General Acts of Alabama 1943, page 157, does not come within the scope of the opinion of this office rendered to Hon. Ben P. Singleton, Chief Examiner of Public Accounts, under date of October 20, 1943, and is not subject to the constitutional objections contained therein.

The said opinion held that Act No. 321, Local Acts of Alabama 1943, page 188, referring to Tuscaloosa County fifty per cent of the fines collected for traffic violations, violated that part of Section 105 of the Constitution of 1901 which prohibits the passage of a local law "in any case which is provided for by a general law." However, the statute therein held unconstitutional was a local law expressly applicable only to Tuscaloosa County.

This reasoning is inapplicable to Act No. 171, General Acts of Alabama 1943, page 157, which provides that in all counties of 300,000 or more population the fines, forfeitures and costs collected for traffic violations shall go to the general fund of the county in cases where the arrests are made by the sheriff or other county or municipal law enforcement officers. The Supreme Court of Alabama in the cases of *City of Birmingham v. Wheeler*, 225 Ala. 678,

145 So. 140, and *Dixon v. State*, 232 Ala. 150, 167 So. 349, held that statutes applicable to counties with 300,000 or more population were general laws and not local acts.

Therefore, inasmuch as the said Act No. 171 is a general law, it does not come within the constitutional inhibition of Section 105 of the Constitution of 1901, and the fines, forfeitures, and costs collected in such cases when the arrests are made by the sheriff, or other county or municipal law enforcement officers, should be paid into the general fund of the county.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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January 24, 1944.

Hon. Wm. W. Hill,

Judge of Probate,

Montgomery County,

Montgomery, Alabama.

Code 1940, Title 51, § 453—Licenses—Income Tax Returns—

Persons engaged solely in preparation of income tax returns for the public or aiding in the preparation of such return are not, without more, subject to the license imposed upon actuaries, auditors, and public accountants by Code 1940, Title 51, Section 453, or to any other provision of the State Revenue Law.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of January 17, 1944, is as follows:

"There has been a new profession established in Montgomery and we are at a loss as to what license schedule, if any, to place this profession under. They advertise that they will prepare State and Government income tax returns.

"One of the parties came into this office early in December and asked for a license. We could find no schedule except Title 51, Schedule 453, Actuaries, Auditors and Public Accountants which is \$25.00 to the State. The applicant stated that he was not an actuary, would do no auditing

or public accountancy work, but would simply take the figures presented to him by a firm or individual and properly fit them to conform to the returns for income tax to the State and Government. We did not issue a license but directed him to the Privilege License Department at the State Capitol where they were also in doubt, it seems, as to what schedule, if any, to put him under. Several days ago the License Inspector cited this firm under Schedule 453 and he appeared this morning and stated that while he was willing to pay this license he did not feel that it covered his type of business and as he had presented himself to the license issuing authority which was also in doubt as to what, if any, schedule, to put him under, that he should not be penalized.

"The information we are asking is: Does this individual or firm owe a license? If so, under what Schedule, and should we, if collecting a license, collect a penalty as they have been operating since December 20th."

The question is whether a person who holds himself out merely as competent to prepare income tax returns and who in the preparation thereof does no auditing or accounting work, is subject to the license imposed on actuaries, auditors and public accountants by Code 1940, Title 51, Section 453, or any other provision of the Revenue Law.

Such activities do not, in my opinion, coincide with those of an actuary, auditor or public accountant as those words are generally understood and defined in dictionaries. No doubt auditors and accountants and also sometimes possibly lawyers prepare or aid in preparation of income tax returns, but on the other hand I do not think that the preparation of such returns of itself can fairly be said to amount to practicing the profession of an auditor or accountant or to constitute the practice of law.

I am of opinion, therefore, that the persons to whom you refer are not subject to the license imposed upon actuaries, auditors and public accountants by Title 51, Section 453. Nor am I able to find any other provision of the Revenue Law of Alabama which imposes a license upon the preparation of income tax returns.

This conclusion is based upon the rule of construction that revenue laws imposing taxes or licenses, when their provisions are ambiguous or doubtful, will be construed strictly in favor of the taxpayer and against the taxing power. 59 C. J. 1131, § 670.

Such statutes are not to be extended by construction or implication beyond the clear import of the language used nor will they be enlarged so as to embrace matters or persons not specifically named or pointed out. See also *State v. Coastal Petroleum Co.*, 240 Ala. 254, 198 So. 610; *State v. Seale Piano Co.*, 209 Ala. 93, 95 So. 451; *United States v. Merriam*, 263 U. S. 179, 29 A. L. R. 1547.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

January 28, 1944.

Hon. J. E. Corbin, Mayor,

City of Albertville,

Marshall County,

Albertville, Alabama.

Municipal Corporations—Code 1940, Tit. 37, §§ 394 et seq. Waterworks Board—Code 1940, Tit. 37, §§ 414, 452—General Acts 1943, p. 575—

1. A member of the governing body of a city or town, although he may receive no salary or compensation as such officer, is not authorized also to accept employment by a municipal waterworks board organized under Code 1940, Tit. 37 et seq., as amended. (Acts 1943, p. 575.)

2. Acceptance of such employment is ground for impeachment.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of January 19, 1944, is as follows:

“Will you please give me an official opinion on the matters set out herein below:

“Our city owns its electric and water systems and operates them under a Municipal Utilities Board under an Act of the 1943 Legislature.

“Mr. W. G. Moultrie who is a member of our City Council has recently accepted a position as bookkeeper or accountant with the said Municipal Utilities Board, and I would like to have your opinion as to whether or not this alderman can retain his office as alderman and at the same time be employed by the said Municipal Utilities Board.

“I would thank you to let me have your opinion as early as you can.”

A corporation or waterworks board organized under Code 1940, Tit. 37, §§ 394 et seq. or the statute (Acts 1936,-37, Ex. Sess. p. 274) thereby codified, as amended by Act No. 572, H. 392, approved July 10, 1943 (General Acts 1943, p. 575) is a public corporation and a municipal instrumentality. See opinion of Attorney General rendered Mar. 2, 1939, to Hon. J. Lee Smith, Judge of Probate, Chilton County, Quarterly Report, Attorney General, Vol. XIV, p. 166.

Its business and affairs, including its fiscal management, are handled by a board of directors selected by the municipal governing body. Act No. 572, supra. The funds received by the board are devoted primarily to payment of operating expenses and indebtedness and interest thereon incurred for construction or acquisition of the plant. When this debt is discharged title to the plant vests in the municipality and the "corporation shall be automatically dissolved." Code 1940, Tit. 37, § 400.

Obviously operating revenues of the plant are public funds. They must be applied after paying operating expense, to discharging the debt incurred for construction or acquisition of the plant with a view to ultimate investiture of title in the city or town. Such funds are administered and disbursed for benefit or account of the city or town.

Code 1940, Tit. 37, § 414, forbids an alderman or municipal employee from being "directly or indirectly interested in any work, business, or contract, the expense, price, or consideration of which is paid from the treasury."

Section 452 of Title 37 provides, among other things, that "any mayor or alderman, or other member of the governing body of any municipality who shall have any private or personal financial dealings with, for or on account of the municipality, except such as are imposed by his official position or who shall render any service or do any work or supply any commodity, for financial compensation, payable out of the funds of the municipality, shall be guilty of a misdemeanor, and the doing of such act shall constitute grounds for impeachment of such person."

I see no basis to contend that the funds of a municipal water works or electric plant are not public funds. The words "paid from the treasury" in § 414, supra, and the words "funds of the municipality" in § 452, are merely different ways of designating funds accruing or held for the account of the municipality.

In *Garner v. State*, 26 Ala. App. 246, 158 So. 543, cert. den. 229 Ala. 600, 158 So. 546, it was held that acceptance by a member of the City Commission of the City of Florence of compensation in addition to that prescribed by law as salary, no matter what service he might have rendered in consideration thereof, was a violation of these statutes (Code 1923, §§ 1891-1910) and amounted to statutory embezzlement of public funds.

The obvious intent of these statutes is to remove any occasion or opportunity whereby a member of the governing body may by other employment by the city personally benefit or profit, on the theory that his duty as public officer is incompatible and conflicting with his personal profit or advantage derived from such other employment or by contract with the municipality.

In my opinion acceptance by a member of the city council of employment by an agency or instrumentality of the municipality, such as a waterworks board, is a violation of these statutes, and constitutes grounds for his impeachment and removal as a member of the council.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 7, 1944.

Hon. G. R. Swift,

State Highway Director,

Montgomery, Alabama.

## State Highway Department—Contracts—

Provision, in contract between State Highway Department and contractor for construction of a highway, that in the event common carrier rates current when the contract was executed should be increased thereafter on materials entering into and forming a part of the contract "project," such increase would be paid by the department to the contractor, imposed no obligation on department to reimburse contractor for payment of the federal transportation tax on transportation of such materials.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of February 1, 1944, is as follows:

"Re: 2% Freight tax.

"This Department let a contract for a project in Dale and Coffee Counties, in which a special provision was included providing for refund to contractor in the event freight rates were increased and a deduction by the Department in the event the rates were lowered. A copy of this special provision is herewith enclosed. After the contract was let a 2% tax was placed on all freight, this included all freight on the project above referred to.

"Please advise this Department if it is liable to the contractor for payment of this 2% tax on freight. The contractor is of the opinion that this said tax constituted a rate increase."

The contract provision to which you refer reads as follows:

"It is understood and agreed that the accepted proposal for this project is based on common carrier rates current on the date of the submission of the proposal. In the event such rates are increased thereafter on materials entering into and forming a part of the project, such increase, when properly shown by receipted common carrier bills, shall be paid by the Highway Department to the Contractor; Provided, That should there be a reduction in the common carrier rates on said materials, the amount of such reduction shall be deducted by the Highway Department from any money due the Contractor on said project."



Probably the tax you refer to is the so-called federal transportation tax of 3% of the amount paid to the carrier for transportation of property imposed by the Act of Congress of Oct. 21, 1942 (56 Stat. 979—26 U. S. C. A., 1943 Pocket Part, § 3475).

Such tax cannot fairly be said, in my opinion, to have been within the contemplation of the parties as an increase of "common carrier rates" current when the contract was executed. The tax is an excise imposed, not by the carrier, but by the sovereign taxing power,—not in order to increase carrier charges, but to provide revenue for governmental purposes. While it may have the effect of increasing the cost of transportation, it is a tax and not an increase of common carrier rates.

You do not State when the contract in question was executed. If it was executed after approval of the Act of Congress, then *a fortiori* the above-quoted contract provision would not serve to place any liability on the State to reimburse the contractor for the payment of such taxes. If the contract was executed prior to passage of the Act, then in the absence of express contract stipulation as to taxes, the obligations and liabilities of the respective contracting parties would not be affected by subsequent tax measures.

I find no basis for reading into the contract any obligation on the part of the State, or of the State Highway Department, to reimburse the contractor for payment of any taxes he may have paid by reason of performance of the contract, although the effect of the imposition of such taxes may have been to increase the cost of performing the contract. All contracts are made subject to the hazards of future taxation, in the absence of express stipulation or agreement with reference to the impact of such taxation, whether anticipated or not when the contract was executed.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 17, 1944.

Hon. O. L. Andrews,

Clerk, Circuit Court,

Jefferson County,

Birmingham, Alabama.

Code 1940, Tit. 15, § 12—Military or Naval Leave of absence—Public Officers and Employees—Opinion, Quarterly Report Attorney General, Vol. XXI, p. 34 modified.

Officers and employees of the State, or any county, municipality, agency or political subdivision of the State, who become active members of the U. S. Naval Reserve are entitled to the benefits provided by Code 1940, Tit. 35, § 12, irrespective of prior status, whether they become such members by virtue of the Selective Service Act or otherwise.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of February 10, 1944, is as follows:

"I am in receipt of your letter of Feb. 8, 1944 and wish to thank you for your prompt answer to my request.

"Section 12, Title 35 seems to apply to all officers and employees of this county, as well as the State of Alabama and municipalities, it further seems possible that the words 'shall be active members of the United States Naval Reserves' is intended to include persons who shall become active members of the U. S. Naval Reserves after passage of the afore-said act.

"The county employee in this office is not now an active member of the U. S. Naval Reserve but I think shall become an active member of the U. S. States Naval Reserve by way of being drafted and placed in the United States Naval Reserve.

"The opinion rendered October 15, 1940 (Quarterly Report, Attorney General, Vol. XXI P. 34) in answer to Hon. W. C. Harrison's inquiry No. 5 did not to me seem to take into consideration that a person conscripted into the U. S. armed forces and placed into the U. S. Navy becomes an active member of the U. S. Naval Reserves, thereby possibly being entitled to benefits provided by said act.

"I wish you would at your convenience let me know if a Deputy Clerk of the Circuit Court of this County who becomes an active member

of the U. S. Naval Reserves under the Selective Service Act is entitled to the benefits from Jefferson County provided by Section 12, Title 35 of 1940 Code."

I am of opinion that any officer or employee of the State of Alabama, or of any county, municipality, or other agency or political subdivision thereof, who becomes an active member of the United States Naval Reserves, whether by virtue of the Selective Service Act, or otherwise, is entitled to the benefits provided by Code 1940, Tit. 35, § 12.

As pointed out in your letter the opinion of this office rendered Oct. 15, 1940 (Quarterly Report, Attorney General, Vol. XXI, p. 34) did not take into consideration, apparently, the fact that such officer or employee may under the Selective Service Act become an active member of the U. S. Naval Reserves. Said opinion is therefore modified hereby to the extent it is in conflict with this opinion.

Once the status of such officer or employee is definitely established as an active member of the U. S. Naval Reserves, it would seem to be immaterial what his former status was. No discrimination should be made as between members of said reserves. They are all alike entitled to the benefits accorded them under Section 12. Said Section is prospective as well as retrospective in operation. See also opinion of April 6, 1943 to Hon. I. C. Heck, State Comptroller, (Quarterly Report, Attorney General, Vol. XXXI, p. 13).

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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February 18, 1944.

Hon. Joe N. Poole,

Department of Agriculture and Industries,

Montgomery, Alabama.

Acts 1943, p. 25—Alabama State Markets Board—Merit System Act  
—Agricultural Fund—

1. The Alabama State Markets Board is authorized to adopt rules and regulations not inconsistent with the terms and purposes of Act No. 32, H. 30, approved May 21, 1943, (Gen. Acts 1943, p. 25) for the conduct of its business as set out in Section 3 of said Act.

2. Its receipts and revenues must be deposited monthly in the State Treasury to the credit of the Agricultural Fund and disbursed by requisition upon the Comptroller and warrant by the Comptroller on the State Treasury.

3. Funds appropriated under said Act are to be used for the purposes set out in Section 3 of the Act.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of January 28, 1944, is as follows:

"You will find enclosed a copy of the Marketing Act, recently passed by the Legislature, under which my Board and I are planning to operate. According to the Governor's interpretation and mine, the Board can do practically anything they wish to, so far as marketing is concerned, except pay the Market Master more than \$5,000 per year. Please advise me if this is your interpretation of the act.

"Your opinion is respectfully requested as to what use the funds appropriated by this Act may be used."

Possibly the statement that "the Board can do practically anything they wish to, so far as marketing is concerned, except pay the Market Master more than \$5,000 per year" is subject to additional limitation; viz:

(1) Employees are subject to the Merit System Act. Gen. Acts 1943, pp. 25, 27 § 5.

(2) Markets established under the Act must be operated, not for profit, but with a view solely of payment of operating expenses and liquidation of the costs of construction and equipment. § 4.

(3) All revenues and receipts from operation of markets must be "deposited monthly in the State Treasury to the credit of the Agricultural Fund," and must be disbursed by requisition upon the State Comptroller and warrant drawn by the Comptroller upon the treasury. § 4.

(4) Rules and regulations adopted by the Board must not be inconsistent with the terms and purposes of the Act. § 2.

I am of opinion also that all operating income, after payment of operating and maintenance expenses, should be set aside in a reserve to reimburse the general fund for money appropriated out of the general fund in the State Treasury under Section 6 of the Act. It was the manifest intent of the Act to make markets established thereunder "self-liquidating projects." Its funds are however public funds and must be handled as other public funds.

The funds appropriated by the Act under Section 6 are to be used for the purposes set out in the preceding Section 3, to wit, acquisition, in the name of the State, of market sites, erection of improvements thereon for the purpose of operating markets, and the operation of such markets. These are all of them matters committed to the sound discretion of the Board which acts much as the Board of Directors of a private corporation would act, subject to the limitations hereinabove stated. The Board should keep a record of its proceedings, adopt rules and regulations for the conduct of its business, and act by resolution duly adopted and spread upon the minutes of its meetings.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 18, 1944.

Hon. W. W. Lazenby,

Tax Assessor,

Lee County,

Opelika, Alabama.

Taxation—exemptions—college fraternities and sororities—Fraternity Houses—Constitution 1901, Section 91—Code 1940, Title 51, Section 2—Opinion of July 12, 1927, Biennial Report Attorney General, 1926-1928, page 220 overruled.

The property of college fraternities and sororities is not exempt from taxation as being used exclusively for school or educational purposes.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of January 24, 1944, is as follows:

"Referring to your opinion to me dated December 4th 1943 with reference to the elimination of Sections 7185 as it appears in the Code of 1923 from the 1940 code resulting in liability of social clubs property to taxation, and the elimination of Section 7192 as it appears in the code of 1923 from the 1940 code, resulting in liability of non-profit corporations organized for public improvements to taxation.

"I have been informed that the Attorney General's office has heretofore ruled that fraternity houses in Alabama at the various colleges are not taxable. In Lee County there have been organized under Sections 7176-7189 of the 1923 Code corporations to hold title to fraternity property and houses. Does the elimination of Section 7185 of 1923 code from the 1940 code make these fraternity houses and properties taxable?"

In determining whether property is exempt from taxation the statute providing for exemption is construed strictly, and in case of doubt or ambiguity the exemption will be denied.

In other jurisdictions having a constitutional provision for exemption of property used exclusively for school or educational purposes, similar to our own, (Constitution 1901, Section 91), it is uniformly held that the property of college fraternities is not entitled to the exemption as property exclusively used for such purposes. *People ex rel Carr v. Alpha Pi*, 326 Ill. 573, 158 N. E. 213, 54 A. L. R. 1376 (1927); *Knox College v. Board of Review*, 308 Ill. 160, 139 N. E. 56, 35 A. L. R. 1041, 1045 Annotation.

In these cases the view is entertained that the property or such fraternities and also of sororities cannot be said to be used exclusively for school or educational purposes and that, on the contrary, such property is generally used in the same way that boarding and lodging houses, clubs, and dormitories are used.

Inasmuch, therefore, as there is no statutory or constitutional provision exempting such property from taxation in Alabama, by reason of the omission of Sections 7185 and 7192 of the Code of 1923 from the present Code of 1940, I am of opinion that such property is assessable for taxation.

In my opinion rendered July 12, 1927, to Hon. L. H. Brassell, Associate Member, State Tax Commission, Biennial Report 1926-28, page 220, a contrary view was expressed, without, however, citation of any authority in support thereof. Said opinion is, therefore, hereby overruled and withdrawn.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 18, 1944.

Hon. Ben C. Morgan,

Director of Conservation,

Department of Conservation,

Montgomery 4, Alabama.

Muscle Shoals Lands—Acts of Congress of May 23, 1828 (4 Stat. 290)—

1. Whether the State has acquired an indefeasible title to lands granted by the Act of Congress of May 23, 1828, now remaining unsold or undisposed of, is a question of fact, depending on whether the conditions of the grant were complied with.

2. If such conditions were complied with the State has an indefeasible estate in fee in and to such lands and holds the same in trust to apply the proceeds of sale thereof to improvement of navigation in the Coosa, Cahawba and Black Warrior rivers.

3. If such conditions have not been complied with the State's title in such lands is subject to forfeiture by Act of Congress or by suit by the Attorney General of the United States, either with or without authority of Congress.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of January 18, 1944, is as follows:

"Under the terms of the Act of Congress, approved May 23, 1828, cited in volume 4, U. S. Statutes at Large, Page 290, certain lands were granted to the State of Alabama. The land therein granted has since become known as the 'Muscle Shoals Land'. The present status of these lands is now in question.

"Your official opinion is requested on the following points:

"(1) Is the State of Alabama, at this time, vested with an unconditional and unencumbered title to said lands?

"(2) May the State of Alabama sell and convey these lands in fee, or the mineral from said lands, or the timber grown thereon?

"(3) If the State of Alabama may legally sell and convey said lands, or any portion thereof; in the event of such sale, or the sale or lease of any timber thereon, or minerals therefrom, what disposition shall be made of the proceeds of such sale or lease?

•  
“(4) What Department of this State is charged with the management, control, or disposition of said lands?”

“I would greatly appreciate your usual prompt attention to this matter, and assure you that an early opinion on the questions herein propounded will be of great benefit to this Department.”

The Act of Congress of May 23, 1828 (4 Stat. 290) is in words and figures as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled, That 400,000 acres of the relinquished lands in the counties of Madison, Morgan, Limestone, Lawrence, Franklin and Lauderdale, in the State of Alabama, be and the same is hereby, granted to said state, to be applied to the improvement of the navigation of the Muscle Shoals and Colbert Shoals, in the Tennessee River and such other parts of said river within said state as the legislature thereof may direct. But if there shall not be 400,000 acres of relinquished unappropriated lands in said counties, the deficiency to be made up out of any unappropriated lands in the county of Jackson in said state.

“Sec. 2. And be it further enacted, that said state of Alabama shall have power to sell, dispose of and grant said land, for the purpose aforesaid, at a price not less than the minimum price of the public lands of the United States at the time of such sale.

“Sec. 3. That the said State of Alabama shall commence such improvements within two (2) years after the passage of this act, and complete same within ten (10) years thereafter.

“Sec. 4. That if said state shall apply the lands hereby granted, or the proceeds of the sales, or any part thereof, to any other use or object whatsoever, then as directed by this act, before said improvements shall have been completed, the said grant for all lands then unsold shall hereby become null and void, and the said state shall become liable and bound to pay to the United States the amount for which such land, or any part thereof, may have been sold deducting any expenses incurred in selling the same.

“Sec. 5. That the improvements of said navigation shall be commenced at the lowest point of obstruction in said river within said state, continue up the same until completed, and be calculated for the use of steamboats, according to such plan of construction as the U. S. Engineers, appointed to survey and report thereon, may recommend, and the president of the United States approve. Provided that such plan shall embrace, if practicable, a connection of the navigation of Elk River, with the said improvements.

“Sec. 6. That after the completion of said improvements the surplus of said grant, if any, shall be applied to the improvement of the navigation of the Coosa, Cahawba and Black Warrior Rivers, in said state, under the direction of the legislature thereof.



"Sec. 7. That the said rivers, when improved as aforesaid shall remain forever free from toll for all property belonging to the Government of the United States, and for all persons in their service, and for all the citizens of the United States unless a toll shall be allowed by Act of Congress.

From a letter dated October 7, 1941, to General Land Office, Department of Interior, Washington, from Charles W. Lee, Chief Division of Land and Property, and an answer thereto dated October 30, 1941, from the General Land Office, it appears that at some time after the passage of the Act of Congress the Secretary of the Interior and the President approved three lists of land known as Muscle Shoals Grant, which had been submitted to them for the purpose of perfecting the State's title to said land. In its letter of October 30, 1941, the General Land Office seems to have construed these lists as having the effect of patents and as issued "merely as an evidence of the State's title."

I have been unable to find any acceptance of the grant by the State of Alabama except an Act of the General Assembly, approved January 20, 1829, entitled "An Act to enable the State of Alabama to sell and dispose of certain land therein named." This Act was at least an implied acceptance of the grant. It provides for the selection of 400,000 acres of relinquished lands in the counties designated in the Act of Congress, classification and valuation thereof by commissioners, and notice to the Land Office at Washington of such selection, together with numerous provisions for determining preemption rights and adjudication of adverse claims.

By Act of the General Assembly, approved January 15, 1830, entitled "An Act to appoint canal commissioners for the improvement of the navigation of the Tennessee River and for other purposes," provision was made for appointment of commissioners with power to make contracts for the construction of canals, requiring them to report to the Legislature and providing for payment of their expenses from the proceeds of sale of these lands.

By another Act of the General Assembly, approved January 15, 1830, there was established a Board of Internal Improvement for the State of Alabama, providing for the cost of internal improvements out of a special fund.

It is to be noted that the original Act of May 23, 1828, required that the improvements to navigation in the Tennessee River be completed within ten years after passage of the Act, and that they should be commenced at the lowest point of obstruction in said river, should continue up the same until completed, and should be calculated for the use of steamboats according to plans approved by U. S. Engineers appointed to survey and report thereon, and approved by the President.

Section 6 of the Act provides that after completion of the improvements the surplus of the grant, if any, shall be applied to improving navigation in the Coosa, Cahawba and Black Warrior Rivers under direction of the State Legislature.

In Section 4 it is provided that if the State should apply the lands or proceeds of their sales or any part thereof otherwise than as provided by

the Act before completion of improvements title to all lands then unsold shall, in effect, revert to the United States, or to quote the words of the Act, "said grant for all lands then unsold shall hereby become null and void."

In *Gallaway v. Henderson*, 136 Ala. 315, on page 322, with reference to the operation and effect of land grants by Congress to the State of Alabama in aid of railroad construction, upon condition that the work be done or completed within a limited time, it was said:

"By the acceptance of the grant, the State became the trustee of the United States, and as such its application and power of disposition of the lands was limited to the purposes expressed in the Act creating the trust. The Act of Congress was a law as well as a grant, and any application or disposition of the lands by the State, in violation of the terms of the Act, was absolutely void." See also *Swann and Billups v. Lindsey*, 70 Ala. 507.

In that case, on page 520, it was held that title to the lands granted vested in the State subject to be divested by action taken therefor, provided the road was not completed within the time specified, in which event the undisposed of lands reverted to the United States Government.

Whether or not the State of Alabama complied with the conditions imposed by the Act of May 23, 1828, is a question of fact which will have to be determined from investigation and study of its records relating to these lands and also, no doubt, further independent investigation. If the State did, as a matter of fact, comply with the terms of the grant there could be no question as to forfeiture of the unsold lands.

If, however, as a matter of fact the conditions of the grant were not complied with then the State's title to unsold lands would remain subject to forfeiture, either by congressional act or direction or even by suit filed by the Attorney General of the United States for that purpose without such congressional direction or authority. *Kern River Company v. United States*, 257 U. S. 147 66 L. Ed. 175.

Nor does the six-years statute of limitations (43 U. S. C. A. § 1166) applicable to suits to forfeit patents to public lands apply where title has vested under a grant as in this case by special Act of Congress, and title has been perfected by the certification of a list of lands selected or granted. *Kern River Company case*, supra. See also *Opinions of the Attorney General of the United States*, 1916, Volume 30, page 572.

Whether the State has "an unconditional and unencumbered title" depends on whether or not the State has complied with the condition on which the grant was made. That condition was a condition subsequent and upon non-compliance therewith a forfeiture of the State's title to unsold land might be effected on the part of the United States as above indicated, either by Act of Congress or by suit by the Attorney General in the name and behalf of the United States. 50 C. J. 1047, § 357, 1050, § 364.

Whether or not the State's title is subject to forfeiture it is clear from the Act of Congress itself that the proceeds of any future sales of presently unsold lands must be applied, after completion of improvements in the Ten-

nessee River to improvements of navigation in the Coosa, Cahawba, and Black Warrior Rivers. As already stated, the State holds the unsold lands in trust and as said in *Swann and Billups v. Lindsey*, supra, on page 519, "the act of Congress constituted the State the administrator of its bounty, but hedged it around with limitations it could not transcend."

Under these conditions and until it is definitely ascertained whether or not the State has complied with the terms of the grant I deem it unnecessary and inappropriate to undertake to answer your remaining questions. Upon further investigation and report as to the facts, I shall be prepared to go into those questions.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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February 25, 1944.

Hon. Holt A. McDowell, Sheriff,

Jefferson County,

Birmingham 3, Alabama.

Elections—Returning Officer—Act No. 311, General Acts of Alabama 1943, page 299.

Under the provisions of Act No. 311, General Acts of Alabama 1943, page 299, a returning officer who is allowed \$4.00 per day for his service is also entitled to five cents per mile for going to the court house and returning to the place of election.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of February 15, 1944, is as follows:

"An act of the 1943 Legislature, as found in the general acts, page 299, provides for the pay to election officials. The act, I believe, is not quite clear as to whether the returning officer should in boxes where more than seventy-five votes are cast be paid mileage in addition to \$4.00. Jefferson County, having over 400,000 population, the officials under this act are entitled to \$3.00 and in addition to 5 cents a mile for the returning officer. The act then indicates that if more than seventy-five votes are

cast in any one box the returning officers, inspectors and clerks shall be paid \$4.00 but there is no provision for paying mileage at the same time the returning officer is to receive the \$4.00.

"Please officially advise me if the returning officer is entitled to the \$4.00 pay and also entitled to 5 cents a mile for going to the courthouse and returning to the place where the election was held."

It is my opinion that your question should be answered in the affirmative.

Act No. 311, General Acts of Alabama 1943, page 299, providing for the compensation and expenses of returning officers, is as follows:

"That Section 198 of Title 17 of the Alabama Code of 1940 be and the same is hereby amended to read as follows: The returning officer, the inspectors and clerks, shall each be entitled to two dollars, and the returning officer, in addition, to five cents a mile in going to the court house and returning to the place of holding the election; the several claims to be paid out of the County treasury, on proper proof of the service rendered to be preferred claims, payable from the money in the treasury not specifically otherwise appropriated; provided, however, that in counties having a population of four hundred thousand or more according to the last or any subsequent Federal census, the returning officer, the inspectors and clerks, shall each be entitled to three dollars, and the returning officer, in addition, to five cents a mile in going to the court house and returning to the place of holding the election, except that in those boxes where more than seventy five votes are cast in any election, the returning officer, the inspectors and clerks shall, for such election, be paid four dollars each."

A consideration of the last clause of this Act might be interpreted as allowing the returning officer only \$4.00 per day. However, it is necessary to consider the Act as a whole in order to arrive at its true meaning. Obviously it was intended by the Legislature that in any instance the returning officer would be entitled to five cents per mile in going to the court house and returning to the place of holding the election. The circumstances under which the returning officer is entitled to a compensation of \$4.00 is limited to boxes where more than seventy-five votes are cast. Manifestly, this is designed to make the compensation commensurate with the additional work. This purpose will be defeated if the Act were construed so as not to entitle the returning officer to the mileage allowed in all other instances.

It is my opinion that the Legislature intended that the five cents per mile be paid to the returning officer when he receives the compensation of \$4.00 per day.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 25, 1944.

Hon. Frank O. Deese,

Judge of Probate,

Dale County,

Ozark, Alabama.

Voters list, Transfer of—

The court of county commissioners may pay probate judge a reasonable compensation for transfer of voters list from old book to new book.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of February 15, 1944, is as follows:

"The Alphabetical List of Registered Voters of Dale County has been in use since 1914. It has been checked, re-checked, corrected and interlined so often that much of it has become almost unintelligible. It is difficult in numerous cases to determine who are qualified to vote. Much doubt often arises when it becomes necessary for this office to prepare lists of the qualified voters.

"I desire your opinion as to whether the County can legally authorize this office to purchase new record books and pay us for transferring names of voters from the old books to the new ones, and, if so, what charge would be permitted to make for this work."

It is my opinion that the governing body of Dale County may, by appropriate resolution, authorize the Judge of Probate to purchase new record books to be used in the transfer of the list of registered voters of Dale County, and may also provide reasonable compensation for the services performed in such transfer.

Your attention is directed to Title 13, Section 290, Code of 1940, which is as follows:

"§ 290. Recopy of books and plats.—The judge of probate deeming it necessary to recopy or rebind any books in his office including maps or plats in order to secure their contents from damage or loss, must submit the same to the examination of the court of county commissioners, which, if it deem such rebinding or recopy necessary, must upon its minutes order

the same to be made; and the judge of probate must make the same in good and substantial books or binding, and such court must allow him a reasonable compensation therefor."

It is my opinion that Section 290, *supra*, is ample authority for the county governing body of Dale County to authorize the purchase of new record books and to allow the Judge of Probate reasonable compensation for transferring the list of registered voters of Dale County to such new record books.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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February 28, 1944.

Hon. B. G. Farmer, Sheriff,

Houston County,

Dothan, Alabama.

Inferior Courts—Sheriffs—Attendance—Costs and Fees—Local Acts 1923, page 288—General Acts 1943, page 576.

Act No. 573, General Acts 1943, page 576, cannot be construed to entitle the Sheriff of Houston County to a fee for attending the Court of Common Pleas of Dothan, Alabama.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of January 24, 1944, is as follows:

"Please advise me whether or not, under recent Act of the Legislature, General Acts of Alabama, 1943, page 576, I am entitled to fee for attending terms of the Court of Common Pleas of Dothan, Alabama. The Act creating the Court of Common Pleas of Dothan, Alabama, provides that all process issued out of this court must be served by the Sheriff of Houston County."

It is my opinion that Act No. 573, General Acts of 1943, page 576, cannot be construed to entitle the Sheriff of Houston County to a fee for attending the terms of the Court of Common Pleas of Dothan, Alabama.

The Court of Common Pleas of Dothan, Alabama, was established by Act No. 410, Local Acts of Alabama of 1923, page 288, and is an inferior court created in lieu of justice of the peace courts. While under said Act the Sheriff of Houston County is required to serve all process issued out of said Court, there is no duty placed upon him to attend the same when it is in session. There is no authority of law for paying the Sheriff for attending sessions of said Court. Laws relating to the fees and compensation of public officers are strictly construed, and such officers are entitled only to what is clearly given them by law. *McElderry v. Abercrombie*, 213 Ala. 289, 104 So. 671; *Long v. O'Rear*, 186 Ala. 558, 65 So. 59; *Mobile County v. Williams*, 180 Ala. 639, 61 So. 693.

Before the passage of Act No. 573, *supra*, there were no specific fees allowed to sheriffs for attending nonjury criminal or civil terms (sessions) of the circuit court, nor the probate court where no jury was in attendance. Quarterly Report of the Attorney General, Volume 23, page 148. The sole purpose of Act No. 573 was to allow the sheriffs the same fees for attending nonjury civil courts as were allowed them for attending jury civil courts, and the same fee for attending jury and non-jury criminal courts as were paid them for attending civil jury terms of the circuit court, and said Act cannot be construed as allowing the Sheriff of Houston County a fee for attending the Court of Common Pleas of Dothan, Alabama.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 28, 1944.

Hon. Van B. Gilbert,

Director of Public Safety,

Department of Public Safety,

Montgomery 2, Alabama.

The Department of Public Safety—Officers of the Highway Patrol and Investigators thereof are not required to fingerprint any person coming into their custody.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of February 21, 1944, is as follows:

"Re: Fingerprinting.

"Please advise if the Department of Public Safety must fingerprint every person coming into the custody of the Patrol Officers and Investigators of this department?

"Reference is made to House Bill 690, by Johnston of Mobile, Approved July 6, 1943 and found on page 385 of the General Acts of Alabama of the Regular Session, 1943. It does not appear to the writer that this act requires the taking of fingerprints by the Patrol. It is the practice of the department to fingerprint all persons taken in custody by agents of the department on felony cases, but it has not been a practice to take fingerprints of persons taken into custody for minor offenses constituting a misdemeanor. In many instances where an arrest is made by the Patrol, the person arrested may sign a bond if the Highway Patrol Officer approves same and then proceed on his way."

In my opinion neither the Department of Public Safety nor the patrol officers or investigators are required to fingerprint persons coming into their custody.

Permit me to call your attention to the pertinent parts of Act No. 420, General Acts of Alabama 1943, page 385. The subject of the Act reads: "To require the Sheriffs of the Several Counties of the State to Fingerprint Each Person Coming Into His Custody; \*\*\* " Section 1 of the Act is as follows:

"Section 1. It shall be the duty of the sheriff of each county in this state, who shall first take a person into custody, to fingerprint such person and furnish a copy of such fingerprints, with the fingerprint card properly filled out, to the Director of the Federal Bureau of Investigation, Washington, D. C., and a copy to the Director, Department of Public Safety, State Bureau of Investigation and Identification, Montgomery, Alabama."

It must be observed that the Act imposes the duty to fingerprint the persons therein designated on the sheriff of each county. Nowhere is such a duty imposed on the Department of Public Safety, the patrol officers or investigators. Therefore, when an officer of the Highway Patrol or an investigator makes an arrest, the prisoner is in the custody of such officer and not in the custody of the sheriff. In the event where such prisoner is admitted to bail, he is not placed in the custody of the sheriff.

However, Title 45, Section 115, Code of 1940, provides:

"The sheriff has the legal custody and charge of the jail in his county, **and all persons committed thereto** (except in cases otherwise provided by law), and may appoint a jailer for whose acts he is civilly responsible." (Underscoring supplied.)

In cases where arrests are made by the Highway Patrol officers and the prisoners are committed to the county jail, whether the offense is a misdemeanor or a felony, it is the duty of the sheriff to fingerprint such prisoners and follow the other requirements of the Act. It necessarily follows that as the Act imposed this duty on the sheriff, he must perform same whether the



fingerprints are made by others or not. Therefore, when such are made by the Highway Patrol officers or investigators, a duplication of effort results.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 29, 1944.

Hon. H. G. Dowling,

Commissioner of Revenue,

Department of Revenue,

Montgomery, Alabama.

Licenses—Code 1940, Tit. 51, § 499—Manufacturing Plants—

The amount of license imposed by Code 1940, Title 51, § 499 is measured by the amount of invested capital, including supplies, used by the licensee in carrying on business, as shown by the licensee's books and the statement taken therefrom required to be furnished by the licensee upon application for the license.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of February 24, 1944, is as follows:

"Merrimac Hat Corporation, Inc.—License Taxes.

"The above identified corporation is engaged in the operation of a factory in Greenville, Butler County, Alabama, and has so been engaged for the past several years.

"The provisions of Section 499, Title 51, Code of Alabama 1940, requires corporations engaged in the operation of factories to procure license and the amount thereof is based upon the amount invested for plant, equipment, supplies and fixtures.

"This corporation does not own the building in which its factory is located and has heretofore paid license based upon the amount invested for equipment, supplies and fixtures, and excludes the amount invested for plant.

### QUESTION

"Should the operators of a factory in Alabama be required to procure a license based upon the investment for plant, equipment, supplies and fixtures, if the plant is rented and not owned by the operators; or should a license be issued based upon the investment for equipment, supplies and fixtures, alone?"

The word "plant" when used in connection with the manufacturing business has a well defined meaning as inclusive of all tangible fixed assets used in carrying on the business.

"In the commercial sense, a plant may include real estate and all else that represents capital investment in the means of carrying on a business, exclusive of the raw material or the manufactured product."—Webster's International Dictionary, Unabridged.

There is nothing in the statute (Code 1940, Tit. 51, § 499) to indicate that the word as used therein was used in other than its ordinary meaning. This conclusion is borne out by the concluding sentence or proviso of the statute itself, reading as follows:

" \*\*\* Provided that such investment shall be the total capital employed in such plant and the person applying for such license shall furnish a sworn affidavit showing the amount of his investment and accompany the same by a statement taken from the books of the company showing the amount of such investment and such books shall at all times be subject to the inspection of the department of revenue or its agents."

This statute imposes a license tax upon certain types of manufacturing business, measured according to the amount of "the investment for plant, equipment, supplies, and fixtures." It contains no less than seven brackets, in some of which the words "equipment" or "supplies" have been dropped or omitted, and in others of which said words appear expressly. In all instances, however, the word "plant" is used.

It would be unreasonable to hold that a different measure, or "yardstick," should be used on account of the apparently casual or inadvertent omission of some of the terms of measurement. Whatever uncertainty might arise thereby is removed by the concluding sentence or proviso above quoted.

It is to be noted that the applicant for license is required to "furnish a sworn affidavit showing the amount of his investment," together with "a statement taken from the books of the company showing the amount of such investment."

As above indicated "plant" does not include materials and supplies or finished product. To give meaning to the word "supplies" as used in the statute the amount invested therein in addition to the amount invested in the plant should be included in the statement, as a measure of the amount of the license. Otherwise use of the word "supplies" would be footless and the word itself would be without meaning.

I am of opinion, therefore, that it is immaterial whether the licensee owns or holds in fee simple or leases merely the land or site and improvements thereon, where it does business. In any case the only measure for determining the amount of license to be paid is the amount shown by the books to be invested in tangible fixed assets or capital, whether represented by land, buildings, machinery, or equipment, or all of them, or some of them, used in carrying on the business, plus the amount invested in supplies at the time application for license is made.

Thus it will be seen that the fact that in this particular instance the taxpayer leases the premises where he does business should not be considered. The amount of license it should pay will have to be determined solely from its own books of account.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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March 8, 1944.

Hon. J. F. Davis, President,

Court of County Commissioners,

Covington County,

Andalusia, Alabama.

#### PRISONS AND PRISONERS—

1. Under Section 117 and 125 of Title 45 of the Code it is the duty of the sheriff or jailer of the county to furnish at the expense of the county the medicine and medical attention to prisoners in the jail who have been convicted and sentenced to the penitentiary pending their removal to the penitentiary if such prisoner is unable to pay for such services.

2. The medical attention here required includes reasonable necessary hospital attention in connection with the services rendered.

3. If it is brought to the attention of the county governing body it may independent of the non action of the sheriff order medical and hospital attention when it reasonably appears necessary and in such case the county is liable for the reasonable cost of such services.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of February 5, 1944, is as follows:

"A Prisoner in the County Jail who had been convicted and sentenced to eighteen months in the State Penitentiary became ill some three weeks after the Department of Corrections and Institutions had been notified by the Clerk of the Circuit Court that he was ready for transfer by them. This man had an attack of acute appendicitis and the attending physician thought it inadvisable to try to transfer this man to the prison hospital at Kilby before the operation. Following the physician's advice, we immediately sent the man to the hospital in Andalusia and had an appendectomy preformed.

"I would like you opinion on the following questions:

"1. In as much as this man was already a State Prisoner, although confined to the County Jail awaiting the transfer to a State Prison by the Department of Corrections and Institutions, would this expense be a legal charge against the State of Alabama?

"2. If not a legal charge against the State of Alabama, would it be a legal charge against the County?

"Thanking you for an early reply, I am."

We conclude from your letter that you, as President of the Court of County Commissioners, acted for and with the consent of the Board of County Commissioners when you sent the prisoner to the hospital, and on this premise we answer your question.

On entering upon the consideration of the question we are not unmindful that the authority of the counties and their governing bodies must be found in the Constitution or in legislative enactments. **Naftel v. County of Montgomery**, 127 Ala. 563. If authority exists in the present inquiry it must be found in the statute governing Prisons and Prisoners, Code, Title 45, Sections 1-252.

We have examined this body of laws and have been unable to find an express provision authorizing the transfer of a prisoner from a jail to a hospital for medical treatment of the class here involved. Section 115 of this Title makes the sheriff of the county the legal custodian of the jail and all persons committed thereto.

Section 117 of the same Title defines who may be confined in jail. It is therein provided that "(2) convicts sentenced to imprisonment in the penitentiary" may be confined in the jail pending their removal to the penitentiary.

Section 125 of this same Title provides:

"Necessary clothing and bedding must be furnished by the sheriff or jailer, at the expense of the county, to those prisoners who are unable to provide for themselves; and also necessary medicines and medical attention to those who are sick or injured, when they are unable to provide them for themselves."

From the foregoing statutes it is manifest that the sheriff had legal custody of the prisoner in this case.

This same section makes but one limitation as to persons in jail and that is that the prisoner is not to receive medicine and medical attention at the expense of the county unless he is unable to provide such service for himself. Clearly "unable" as here used means financially unable. Under this Section it is the express duty of the sheriff to furnish such services to any and all prisoners who are in jail and unable to provide for themselves such services. It is obvious that the undoubted purpose of the law is to protect the life and health of the prisoners by requiring the furnishing of medicine and medical attention. Then if it becomes necessary to make the medical attention effective to remove the prisoner to a hospital where necessary attention will be administered by an operation, such course falls within the implied authority flowing from the express duty and power conferred by Section 125. It is a principle of statutory construction so well established that citation of authority is unnecessary that where express authority is granted by a statute to do named acts or for the performance of named duties, implied powers are also granted that are necessary to perform the express authority or duty granted.

This same Section 125 requires the sheriff or jailer to furnish the necessary medical attention. However, the dominant purpose of the statute is that the prisoner if unable to furnish it himself shall be furnished such service at the expense of the county. A claim for such service although the prisoner was sent to the hospital by the sheriff or jailer must be presented to the governing body of the county and examined, allowed and settled by it. **Code**, Title 12, Section 12(4).

It sometimes may take time to get a meeting of the governing body and medical aid may be so urgent as to forbid delay, however, if the need comes to the attention of the board it may furnish the services itself and allow the claim. It is easily understood that the condition of the prisoner may be such that the delay in providing for a meeting of the governing body of the county might bring about the prisoner's death. In any event the board passes upon the necessity for the service and its legality. The statute should receive a liberal construction on this point. **41 Am. Juris.** (Prisons and Prisoners) Section 24, page 901; **Spicer v. Williams**, 132 S. E. 291, 44 A. L. R. 1280, see annotation on page 1288.

The principles of our opinion are supported by a former opinion of this office. **Biennial Report Attorney General, 1930-32**, page 3.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 9, 1944.

Hon. J. S. Wittmeier,

Probate Judge and Ex-officio Chairman,

Court of Commissioners,

Blount County,

Oneonta, Alabama.

Sheriffs—Court of County Commissioners—Blount County—Act No. 81, General Acts of Alabama 1943, page 86—Act No. 109, Local Acts of Alabama 1943, page 64.

Where there is a conflict between a local act and a general act, the local act governs as to the county or territory to which it is applicable.

Act No. 109, Local Acts of Alabama 1943, page 64, prescribing the salary of the Chief Deputy Sheriff of Blount County, prevails over Act No. 81, General Acts of Alabama 1943, page 86, authorizing the Court of County Commissioners of each county to limit the salary of the Chief Deputy Sheriff.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of January 26, 1944, is as follows:

"We would like to have your opinion on the following questions:

"First I want to call your attention to page 86 General Acts Alabama Regular Session 1943 and Special Session 1943 and Special Session 1942 to an Act to amend Section 3 of Title 54 of the Code of Alabama, 1940.

"Section 3. DEPUTIES. In all counties of the State of Alabama in which the sheriff is not on a salary basis under and by virtue of a constitutional amendment, the sheriff of such county must have one chief deputy, and may have as many other deputies as he may think proper, but the coroner of such county shall not be appointed a deputy. Said chief deputy shall be appointed by the sheriff of the county to hold office at the pleasure of the sheriff, and for his services shall receive a salary of such amount as may be fixed by the court of county commissioners, board of revenue or other governing body of the county in which such chief deputy is appointed not less than nine hundred and not more than twenty-four hundred dollars, payable in twelve equal monthly installments out of the treasury of the county upon the warrant of the board of revenue or court of county commissioners of such county."

"You will note from the above section that the power to fix the salary of such chief deputy is lodged in the Commissioners Court of this county and that the power of appointment is left to the sheriff.

"Second I want to call your attention to page 64 Local Acts of Alabama 1943. 'Section 1. The salary of the chief deputy sheriff for Blount County, Alabama, shall be in the sum of Fifteen hundred dollars per annum, the same to be paid in equal monthly installments out of the general fund of said county, upon the warrant of the Court of County Commissioners or other governing body of said County.'

"You will note from the General Acts that the chief deputy has no fixed term of office, but holds office at the pleasure of the sheriff and has no definite term; that the Court of County Commissioners has the authority to fix his salary between certain limits.

"You will note from the Local Act that the chief deputy sheriff for Blount County, Alabama, shall be in the sum of Fifteen hundred dollars per annum.

"I wish to call your attention to Corpus Juris Volume 46 page 964, Section 98, which is as follows:

"'98. INDEFINITE TENURE. Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power attempts to fix a definite term; and an officer removable at the pleasure of the appointing power has, in the strict meaning of the word, no 'Term' of office. A constitutional provision that terms of office not fixed by the constitution shall not exceed a specified time does not enlarge the duration of an office held at the pleasure of the executive.'

"If the chief deputy has no fixed term of office, but serves and holds his office at the pleasure of the sheriff could the local Act fix his salary at Fifteen hundred dollars per year?

"You will note that the local act is in conflict with the General Act. We want your opinion advising which Act the Court of County Commissioners will be governed by in making payments to the chief deputy."

It is my opinion that the salary of the Chief Deputy Sheriff of Blount County is fixed at \$1500.00 per annum by Act No. 109, Local Acts of Alabama 1943, page 64, and that Act No. 81, General Acts of Alabama 1943, page 86, authorizing the court of county commissioners to fix within certain limits the salary of the chief deputy sheriff, is inapplicable to Blount County.

In the case of **Downing v. City of Russellville**, 241 Ala. 494, 3 So. (2d) 34, the Supreme Court of Alabama held that where there is an apparent conflict between a general law and a local law, the general law yields to the local law, and both are given effect so as not to conflict. A similar conclusion was reached in the case of **City of Birmingham v. Southern Express Company**, 164 Ala. 529, 51 So. 159.

Therefore, insofar as Blount County is concerned, Local Act No. 109, supra, prevails over the general law, and the Chief Deputy Sheriff of Blount County is entitled to the salary of \$1500.00 per annum prescribed in said Local Act.

That the chief deputy sheriff has no fixed term of office and holds office at the pleasure of the sheriff does not affect the power of the Legislature to prescribe a definite salary for him.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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March 10, 1944.

Hon. B. G. Robison,

Judge of Probate,

Pickens County,

Carrollton, Alabama.

Sheriffs—Special Investigations—Court of County Commissioners—Title 54, Sections 9 and 10, Code of Alabama 1940—Local Acts of Alabama, 1935, page 266.

Court of County Commissioners is without authority to pay expenses incurred by sheriffs in special investigations where direction for such investigation is not made in writing by the Circuit Solicitor, Deputy Solicitor, Attorney General, or Governor.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of January 15, 1944, is as follows:

“On request of a relative of a person who died suddenly while being given treatment by a chiropractor, an Attorney acting for the County Solicitor of Pickens County, who was absent from the State, informed the Sheriff of Pickens County that it was his duty to order or have an autopsy of the body of deceased person to determine, if possible, the cause of the death. The Sheriff went to the Cemetery and the funeral was halted, the body taken to the funeral home of the Undertaker in adjoining County,



the County Health Officer of the County of the deceased and a physician from an adjoining County were called in and the autopsy held. The undertaker who removed the body from cemetery to place of holding autopsy, furnished a place to hold the autopsy and returned the body to the cemetery for burial, and the physician who assisted the County Health Officer with autopsy each presents a bill to the Court of County Commissioners for payment of his services in the autopsy.

"1. Is the Court of County Commissioners legally authorized to pay said bills for services rendered when neither the Governor, Attorney General or Circuit Solicitor ordered the Sheriff to hold an autopsy or a special investigation?

"2. Are Sections 9 and 10 of Title 54, of the 1940 Code of Alabama the only authority of law to make such special investigation and to pay for the expenses thereof.

"3. When no order or direction to the Sheriff was given **in writing** by any one, can the Court of County Commissioners legally pay such claim for said services?

"Please give me an official opinion on the above questions, and oblige."

The authority for the sheriff to make investigations similar to the one set out in your letter, the expenses of which may be paid by the county under the provisions of Title 54, Section 10, Code of Alabama 1940, is found in Title 54, Section 9, Code of Alabama 1940. This Section provides that the sheriff shall make special investigations in his county of alleged violations of the law when he is directed to do so in writing by the Circuit Solicitor, Deputy Solicitor, Attorney General or Governor.

Therefore, inasmuch as your request indicates that no such written authority was given, it is my opinion that the Court of County Commissioners is without authority to pay for services rendered by the undertaker and the physician in making the investigation. The fact that Pickens County, by virtue of Act No. 486, Local Acts of Alabama, 1935, page 266 has a County Solicitor instead of a Deputy Solicitor, is immaterial because said Local Act provides that the County Solicitor shall take the place of the Deputy Solicitor, and prosecute in all cases in which a deputy solicitor is required to prosecute, and perform all duties that the deputy solicitor is required to perform under the general laws of the state.

Section 5 of the Local Act No. 486, supra, provides that in the event such County Solicitor is temporarily disqualified or absent from the County, the Judge of the County Court shall have the right and power to appoint a Solicitor pro tempore who shall exercise all powers of the County Solicitor while so acting. It follows that the Attorney referred to in your letter would be without authority to direct the Sheriff in writing to make the investigation authorized by Section 9, supra, unless such Attorney had been appointed Solicitor pro tempore as provided in said Section 5.

In answer to your second inquiry, I wish to advise you that Title 54, Section 9, Code of Alabama 1940, is the only statute which authorizes the Sheriff

to make such special investigations, the expenses of which may be paid by the Court of County Commissioners, as provided by Title 54, Section 10, Code of Alabama 1940.

Your third inquiry must be answered in the negative, for the reason that the statute expressly provides that the direction of the Sheriff to make such investigations shall be in writing.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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March 10, 1944.

Hon. Ben C. Morgan,

Director of Conservation,

Department of Conservation,

Montgomery, 4, Alabama.

Shrimp—"To fail" to make reports required by Title 8, Section 158, Code 1940 means to fail to make correct report.

Oysters—"To fail" to make reports required by Title 8, Section 159, Code 1940, means to fail to make correct report.

Words and Phrases—"To fail" as used in penal statute requiring reports to be made and penalizing failure.

Title 51, Section 886—Failure to file correct report of number of barrels of shrimp or oysters taken or purchased not actionable under.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 8, 1944, is as follows:

"Please refer to Sections 158 and 159, Title 8, Code of Alabama, 1940. Both of these Sections require reports to be made of the number of barrels of shrimp and oysters taken by catchers, and the number of barrels of oysters and shrimp purchased by dealers and factories, and provides penalties for the failure to make these reports.

"Your opinion is requested as to whether catchers or dealers would be violating the requirements of these sections if their weekly and monthly reports did not actually show the correct number of barrels of shrimp and oysters taken.

"Please also advise me if failure to make correct reports of the actual barrels of shrimp and oysters taken could be prosecuted under Section 886 of Title 51 of the 1940 Code of Alabama."

In my opinion catchers of, or dealers in, shrimp or oysters would be violating the requirements of Sections 158 and 159 of Title 8, Code of Alabama 1940 if their weekly or monthly reports did not correctly show the actual number of barrels of shrimp or oysters taken.

Catchers or dealers in shrimp or oysters cannot be prosecuted under Title 51, Section 886, Code of Alabama 1940, if they fail to make correct reports of the actual number of barrels of shrimp or oysters taken.

The statutes to which your inquiry refers require shrimp catchers to make weekly reports of the number of barrels of shrimp caught and require oyster catchers to do likewise. The statutes also require dealers to make monthly reports of the number of barrels of shrimp or oysters purchased.

To fail to make the required report is obviously a violation of the statute and punishable as a misdemeanor for which the fine is set from \$25 to \$100.

The question is, therefore, whether or not the making of a report stating the number of barrels inaccurately or incorrectly is "to fail" to make the report; and consequently a violation of the statutes.

The statutes are here set out for reference:

"§ 158. **Weekly reports by shrimp catchers.**—The catchers of shrimp shall make weekly reports in writing to the department of conservation of the number of barrels of shrimp caught, the person, firm or corporation or boat to whom shrimp were sold; and any purchaser buying shrimp for resale, or dealer, or wholesaler or factory purchasing said shrimp from any source whatsoever shall make monthly reports in writing to the department of conservation of the number of barrels of shrimp purchased, the names of the party or parties from whom purchased, and the date of purchase. It shall be unlawful for the catchers of shrimp to fail to make the weekly reports herein provided for and shall be unlawful for any purchaser buying shrimp for resale, or dealer, or wholesaler or factory within the state, to fail or refuse to make such reports, or for any such purchaser buying shrimp for resale, or dealer or wholesaler or factory to aid or abet another in any attempt to evade the making of such reports. It shall be unlawful for the catchers, after notice thereof from the department of conservation, to sell or deliver any shrimp to such purchasers buying shrimp for resale or to dealers, or wholesalers, or factories or boats furnishing shrimp to the same, or for any factory to catch any shrimp for use in such factory, within the state, until notified by said department that such purchaser buying shrimp for resale, or dealer, or wholesaler, or factory has complied with the requirements of this section. Any catcher, purchaser buying shrimp for resale, or dealer, or

wholesaler or factory violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars for each offense."

"§ 159. **Weekly reports by oyster catchers.**—The catchers of oysters shall make weekly reports in writing to the department of conservation of the number of barrels of oysters caught, the person, firm or corporation or boat to whom such oysters were sold; and any purchaser buying oysters for resale, or dealer or wholesaler or factory purchasing said oysters from any source whatsoever shall make monthly reports in writing to the department of conservation of the number of barrels of oysters purchased, the names of the party or parties from whom purchased, and the date of purchase. It shall be unlawful for the catchers of oysters to fail to make the weekly reports herein provided for and shall be unlawful for any purchaser buying oysters for resale, or dealer or wholesaler or factory, within the state, to fail or refuse to make such reports, or for any such purchaser buying oysters for resale, or dealer or wholesaler or factory to aid or abet another in any attempt to evade the making of such reports. It shall be unlawful for the catchers, after notice thereof from the department of conservation, to sell or deliver any oysters to such purchasers buying oysters for resale, to dealers, or wholesalers, or to factories or boats furnishing oysters to the same or for any factory to catch any oysters for use in such factory within the state, until notified by said department that such purchaser buying oysters for resale, or dealer or wholesaler or factory has complied with the requirements of this section. Any catcher, purchaser buying oysters for resale, or dealer or wholesaler, or factory violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars for each offense."

From a consideration of related provisions of law it appears that the logical purposes of the required reports are two:

1. To enable the department of conservation to collect a tax levied upon each barrel of shrimp or oysters caught. Title 8, Sections 138, 157.
2. To enable the department of conservation to regulate intelligently the interests and the property rights of the State in certain sea foods existing in Alabama waters. Title 8, Sections 112 et seq. See also Title 8, Section 4.

It is my opinion that the legislature in enacting the law requiring the making of reports intended to require accurate and correct reports. This for the reason that the tax could not be calculated nor the supervision and control of the oyster and shrimp catching business effected without such correct reports. It is the failure to furnish these correct reports for which the legislature has prescribed a penalty. The words "to fail" as used in the statutes, in my opinion, mean to fail in the duty made mandatory—the duty of furnishing correct reports. To hold that the making of an incorrect report is a substantial compliance with the statute would defeat the whole purposes, *supra*, underlying the enactment. The department of conservation could not

collect the prescribed tax nor could it intelligently promulgate rules for the protection, propagation, or conservation of these sea foods if its sources of information be erroneous.

The necessity for correct reports is therefore apparent. When the catcher or dealer makes and files something other than a correct report he has failed to do what the legislature has demanded. When the catcher or dealer files a statement that he has taken twelve barrels of shrimp or oysters, when in fact he has taken fifteen he has failed to supply what the legislature has required. Taking into consideration the purposes for which the reports are to be used inaccurate ones most probably would cause an effect worse than that caused by the complete and utter failure to file at all. In the former case the erroneous reports, in aggregate, may cause regulation when regulation is unnecessary or prevent regulation when it is essential; while the complete failure to file may lead to a further investigation of the facts.

It is not, according to my judgment, an unreasonable burden upon the shrimp or oyster catchers or dealers to require an exact statement showing their catch or purchases especially in view of the fact that such reports are a means for preserving their own businesses.

You are therefore advised that the offense defined by Title 8, Sections 158 or 159 is complete when a report is made showing an incorrect number of barrels.

You are further advised that this opinion deals with the acts made crimes by Sections 158 and 159, supra; and does not discuss the defense of ignorance or mistake of fact, if there be such a defense, to a prosecution under these sections.

In answer to your second inquiry, it is my conclusion that the failure to make correct reports of the number of barrels of shrimp or oysters could not be a cause for prosecution under Title 51, Section 886, Code of Alabama 1940.

This section begins:

“(a) Whenever in this title a tax is payable \*\*\* .”

The tax upon shrimp or oysters caught or purchased is not found in Title 51. The remaining subsections also have reference to Title 51.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 10, 1944.

Hon. Holt A. McDowell, Sheriff,  
Jefferson County,  
Birmingham 3, Alabama.

Jefferson County—Sheriffs—Deputies—Costs and Fees. Title 29, Section 102, Title 62, Section 139, Code 1940, General Acts 1943, page 418.

Deputy Sheriffs of Jefferson County, being on a salary basis, are not entitled to the \$50.00 fee allowed the sheriff, other officer, or person under the provisions of Title 29, Section 102, Code of Alabama 1940, who furnishes the evidence which brought about the conviction in the circuit court of a person for manufacturing or distilling prohibited liquors or beverages.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of February 15, 1944, is as follows:

"A person has been convicted in the circuit court in Jefferson County of unlawfully distilling whiskey. A deputy sheriff in and for Jefferson County, Alabama furnished the evidence whereby the person was convicted. The deputy sheriff has satisfied the judge who presided on the trial of the person convicted that he, the said deputy sheriff, furnished the evidence that brought about the conviction, and that he, the said deputy sheriff, is entitled to be paid the sum of \$50 as specified in Section 102, Title 29, and the said presiding judge has made and delivered to said deputy sheriff a certificate to the effect that said deputy furnished the evidence, brought about said conviction, and is entitled to said sum of \$50.

"Will you kindly advise me whether or not the said deputy sheriff is entitled to be paid the sum of \$50 in accordance with the provisions of Section 102 of Title 29, in so far as Section 139 of Title 62, or the Act approved July 6, 1943 referred to above, bears upon the question?"

Deputy Sheriffs of Jefferson County come under the provisions of the Civil Service System of Jefferson County (Title 12, Sections 133-139, Code of Alabama 1940), their compensation being on a salary basis.

Title 62, Section 139, Code of Alabama 1940, was substantially re-enacted by Act No. 456, General Acts of 1943, page 418, which is in part as follows:

"Section 1. That all county officers on a salary basis in counties of this State having a population of one hundred and forty thousand (140,000) or more according to the last or any subsequent Federal census, shall pay into the county treasury all fees, costs, commissions, and prerequisites (sic) derived from said office or monies, charged or collected by them by

reason of any official act or for the performance of any service connected directly or indirectly with said offices or for the sale of any information or the copies of any documents, papers, maps or records relating directly or indirectly to said offices.

"Section 2. Be it further enacted that the salary fixed by law shall be the sole and only compensation received by such officers for the performance of the duties of their office or for any act or service charged for by them growing out of the performance of their official duties or connected with the operation or conduct of their respective offices."

In view of the provisions of the above Act, which is applicable to Jefferson County, it is my opinion that a deputy sheriff, who is a county officer, is not entitled to the \$50.00 allowed the sheriff, other officer, or person under the provisions of Title 29, Section 102, Code of Alabama 1940, who furnishes the evidence which brought about the conviction in the Circuit Court of a person for manufacturing or distilling prohibited liquors or beverages.

Section 2 of said Act expressly provides "that the salary fixed by law shall be the sole and only compensation received by such officers" for the performance of official acts and duties connected with their respective offices. Under the provisions of Title 54, Section 5 (4), Code of Alabama 1940, the sheriff and his deputies are charged with the duty "to ferret out crime, to apprehend and arrest criminals, and in so far as within their power to secure evidence of crimes in their counties, and to present a report of the evidence so secured to the solicitor or deputy solicitor for the county."

A question similar to the one presented by your inquiry was considered by this office on several occasions, and a like conclusion was reached in these opinions. See Quarterly Report, Attorney General, Volume 30, page 102; Quarterly Report Attorney General, Volume 6, page 15; Quarterly Report Attorney General, Volume 4, page 154, and Office Edition, Volume 3-A, page 62.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 10, 1944.

Hon. Chester Walker,

Probate Judge,

Tuscaloosa County,

Tuscaloosa, Alabama.

Elections—List of qualified electors—Title 17, Section 38, Code of Alabama 1940.

List of qualified electors required to be published by the Judge of Probate under the provisions of Title 17, Section 38, Code of Alabama 1940, cannot be published in a series, but must be published in its entirety at one time.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of February 29, 1944, is as follows:

"As Probate Judge of Tuscaloosa County, I am required to publish a list of the qualified voters of Tuscaloosa County in a newspaper of general circulation in this county on or before the 15th day of April, 1944. Said duty being imposed upon me by Section 38, Title 17 of the Code of Alabama of 1940.

"Due to the paper shortage caused by the war, Mr. Shelton, the publisher of the only paper published in Tuscaloosa County, Alabama, has indicated to me that it will be a great imposition, if not an impossibility for him to publish the entire list of qualified voters in one publication of the Tuscaloosa News. He has assured me of his desire to cooperate with me and has suggested that I give him authority to publish the qualified voters list in a broken up manner. He suggested that I authorize him to publish the list of qualified voters, publishing Beat 1 through Beat 6 on the day then begin with Beat 7 through Beat 10 a few days later, and on through in this manner until the entire list of qualified voters in all 30 Beats in this county has been published. Of course, it is his intention to have the last Beats published on or before the 15th day of April, 1944. In this manner, some of the lists of qualified voters would be published several days before the last publication, but all of the voters' names would be published before the statutory deadline of April 15, 1944.

"Please give me your opinion as to whether or not I, as Probate Judge, charged with the duty of publishing qualified voters' names, can authorize the publisher of the Tuscaloosa News to publish the list of qualified electors in this county in the manner outlined above, or will it be my duty to have the list of all qualified voters published on the same day?

"Of course, I would like to have this inquiry interpreted in the light



of the legality of publishing the voters' names in a series of publications, and, also, in the light of the cost of paying for publication of the list, which is a charge against the general fund of the county."

It is my opinion that the alphabetical list of registered voters cannot be published in a series, but must be published in its entirety at one time.

Title 17, Section 38, Code of 1940, requiring the Judge of Probate to compile a correct alphabetical list of all electors in the county, provides as follows:

"Said lists so made up shall be published by him in some newspaper with a general circulation in said county on or before the fifteenth day of April, 1940, and of each two years thereafter, and together with said lists there shall also be published a certificate that said list constitutes the correct list of all qualified electors who will be entitled to vote in any elections held in said county from the time of such publication until the first day of May of the next succeeding year, and also a notice that any voter duly registered whose name has been inadvertently or through mistake omitted therefrom and who has paid all poll taxes due and who is legally entitled to vote shall have ten days from said publication to have his or her name entered upon said list of qualified voters. If within such ten days any voter shall reasonably satisfy said judge of probate by proper proof that any name should be added to such list, his or her name shall be added thereto. An alphabetical list by districts and precincts of those so added within said ten days shall be prepared and published by said judge of probate in some newspaper with a general circulation in said county on or before the first day of May, 1940, and each two years thereafter."

It appears from the above quoted portion of Section 38 that this list of electors should be published as a whole and have appended thereto a certificate by the Judge of Probate that said list constitutes the correct list of all the qualified electors in the county. In the event that parts of this list were published at different times, this statutory requirement of the certificate could not be properly complied with.

Furthermore, the purpose of this statute is the publication of a complete list of the qualified electors of the county, from which list each elector may readily ascertain whether his name appears thereon, and to give him an opportunity, if his name was erroneously omitted therefrom, to have his name placed on such list within ten days. This purpose would be defeated by requiring each elector to examine several editions of the newspaper to ascertain whether his name was properly listed.

It is my opinion that the list of electors must be published at one time, with a certificate by the Judge of Probate that it constitutes the correct list of all qualified electors who will be entitled to vote in any election held in such county until the first day of May of the next succeeding year.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 13, 1944.

Hon. H. G. Dowling,

Commissioner of Revenue,

State Department of Revenue,

Montgomery, Alabama.

Title 51, Sections 409 and 410, Code of Alabama of 1940—Income  
Tax—Payment—Refund—

A check presented in payment of income tax is a conditional payment of the tax. However, said payment becomes absolute when the check is paid by the bank upon which it is drawn, and the payment is deemed to be made on the date the check was given.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of October 25, 1943, is as follows:

"An official opinion is requested relative to application for refund of income tax, which was filed with this office under circumstances and facts set forth as follows:

"The Virginia Bridge Company, a foreign corporation, filed application for refund, which was received and stamped in this office on March 15, 1943, of income tax alleged to have been erroneously collected for the calendar year 1940. The return and check submitted in payment of the tax, in amount of \$4,293.94, were received in this office March 12, 1941, more than two years preceding the date the claim was filed. The check submitted in payment photostatic copy of which is attached to and made a part of this file, drawn on the First National Exchange Bank of Roanoke, Virginia, apparently cleared through the Federal Reserve Bank of Richmond March 20 and was paid by the bank on which drawn. If it is held that the claim was filed with the State Department within the two-year period following the date of payment on the basis of facts, such claim is valid and will be certified for refund. If, on the other hand, under Title 51, Section 410 of the Revenue Code of 1940, which reads:

" . . . Application for refund shall be made within two years from date of payment . . . . "

it is held that the payment was made more than two years preceding the date the claim was filed, the Department has no recourse other than to refuse to certify to the Comptroller the amount.

"A brief submitted by attorney for the taxpayer, together with photostatic copy of check used in payment of the tax, is attached hereto as

evidence and sets forth the conceded facts.

"An official opinion is requested."

Under the provisions of Title 51, Section 409, Code of Alabama of 1940, income tax must be "paid on the fifteenth day of March following the close of the calendar year," except in certain instances which are not applicable to the situation presented in the instant case.

Title 51, Section 410, Code of Alabama of 1940, is in part as follows:

"In case any taxpayer has through mistake or error paid an income tax which he is not legally due, or has paid an amount in excess of which he was in fact due, such taxpayer may make application on forms furnished therefor, to the department of revenue to have such amount erroneously paid refunded, and upon making satisfactory proof to the department of revenue that such error was made, the department of revenue shall certify to the comptroller the amount to be refunded by the state and warrant shall be drawn for such refund together with interest at the legal rate. Applications for refund shall be made within two years from the date of payment."

Under the facts set out in your request, the income tax return of the Virginia Bridge Company, and the check submitted in payment of the tax shown to be due thereby was received by the State Department of Revenue on March 12, 1941, the application for refund was received by the Department on March 15, 1943, and the check was paid by the bank on which it was drawn on March 20, 1941.

The answer to your inquiry depends on whether the tax was paid on March 12, 1941, when the check was received by the State Department of Revenue, or on March 20, 1941, when the check was paid by the bank on which it was drawn. If March 12, 1941, was the date of payment, the application for refund was not filed within two years from the date of payment, as required by Section 410, *supra*. On the other hand, if the date of payment was on March 20, 1941, the petition for refund was filed within two years from the date of payment.

Several opinions have been rendered by this office which hold in effect that the acceptance of a check by an officer does not amount to a payment of the tax for which it was given. Biennial Report of the Attorney General, 1930-32, pages 183, 194, and 850; Biennial Report of the Attorney General, 1936-38, page 333. However, in these opinions for one reason or another, the check given in the payment of the tax was not paid by the bank on which it was drawn.

The question presented by your inquiry has not been passed upon by the Appellate Courts of Alabama, so I find it necessary to resort to the decisions of the Appellate Courts of other States. The following rule is laid down in 40 Am. Jur., Payment, Section 72:

"With the exception of a few jurisdictions, the authorities are unanimous in supporting the rule that the giving of a draft or bank check by

a debtor for the amount of his indebtedness to the payee is not, in the absence of an express or implied agreement to that effect, a payment or discharge of the debt, the presumption being that the draft or check is accepted on condition that it shall be paid."

The Alabama cases of *Jefferson Motor Co. v. Williams*, 227 Ala. 432, 150 So. 355, and *Watt v. Gans*, 114 Ala. 264, 21 So. 1011, are cited in the notes to the above quoted Section. Both of these cases hold that in the absence of an agreement to the contrary, a check received in payment of an obligation is a mere conditional payment to become effective if and when the same is paid.

However, it is a well-established rule that payment by check becomes absolute when the check is paid by the bank on which it is drawn and the payment is deemed to have been made on the date the check was given. This rule is set out in 40 Am. Jr., Payment Section 86, which Section is as follows:

"Payment by bill or check becomes absolute payment of the debt when the check is paid on presentation. On such payment of the check, the debt is deemed to have been discharged from the time the check was given. Thus, it has been held that a contract which is invalid because made on Sunday is not relieved of its invalidity by reason of the fact that a check paid on that day was paid on a secular day. And if under the circumstances of a particular case it is necessary to make a payment at a particular time, as for example to satisfy the part payment provision of the statute of frauds, a check given and received at that time, but not cashed until after the specified time, will operate as a payment as of the date when given."

In the notes to the above quoted Section, the following cases supporting this proposition are cited: *Hooker v. Burr*, 137 Calif. 663, 70 Pac. 788; *McFadden v. Follrath*, 114 Minn. 85, 120 N. W. 542, *Tonner v. Wade*, 153 Miss. 722, 121 So. 156, *Franciscan Hotel Co. v. Albuquerque Hotel Co.*, 37 N. M. 456, 24 Pac. (2d) 718.

In the annotations in 124 A. L. R. p. 1157, the following statement is found:

"A payment of taxes by check is a conditional payment only, until the check is actually paid. *People v. Woods* (1933) 354 Ill. 224, 188 N E 369; *People ex rel. Ames v. Marx* (1939) 370 Ill 264, 18 N E (2d) 915; *Morgan v. Gilbert* (1929) 207 Iowa 725, 223 N W 483. But although this is true, upon the checks being honored, the payment relates back to the date of the receipt of the checks. *Cantlay & Tanzola v. Ingels* (1939) 31 Cal App (2d) 553, 88 P (2d) 141."

See also annotations in 44 A. L. R. page 1235 in which the following statement is found:

"Where the check has been paid payment will be deemed to have been made as of the time of the receipt. *Hubbard v. Auditor Gen.* (1899) 120 Mich. 505, 75 N. W. 979."

The case of **Tonner v. Wade**, 153 Miss. 722, 121 So. 156, which is cited in the notes in 40 Am. Jur., Payment, Section 72, supra, presents the situation very analogous to the one presented in the instant case. In this case, the taxpayer paid his taxes due on February 1, 1928, by check of the same date. The Tax Collector did not present the check for payment to the bank on which it was drawn until February 9, 1928, at which time it was paid. The question presented by the case was whether the tax was paid on February 1, 1928, when the check was given to the Tax Collector or on February 9, when it was paid by the bank on which it was drawn. In holding that the check became absolute payment of the tax when it was presented to the bank and paid, and that the payment of the tax is deemed to have been made on February 1, 1928, when the check was given, the Supreme Court said as follows:

"Appellant's position is that taxes are payable in money only, and, if paid by check, the payment does not take place until the check is cashed, and that there was sufficient evidence to raise an issue for the jury to determine the question, namely, whether appellee's personal taxes were paid in money or by check which was cashed after the 1st day of February. To sustain that contention, appellant relies upon the case of **Moritz v. Nicholson**, 141 Miss. 531, 106 So 762, and authorities from other states along the same line. It was held in the **Moritz Case** that the failure of the tax collector to present a check given him in payment of taxes, which was not paid because of the failure of the bank on which it was drawn, did not relieve the taxpayer; that the acceptance of the check by the tax collector in payment of the taxes of the drawer, at most, was only a conditional payment of the taxes, and that the taxes were not paid until the check was paid, and, if the check was never presented, or if presented and dishonored, the lien for the taxes were not paid until the check was paid, and, if the check was never presented, or if presented and dishonored, the lien for the taxes on the property of the taxpayer continued; that in such a case the tax collector accepted the check of the taxpayer for the convenience of the latter, and if, for any reason whatever, whether through the fault of the tax collector, or other cause, the check was never presented, the taxes and the lien therefor continued. Appellant argues that the **Moritz Case** is conclusive in favor of his contention. It will be noted that, in the **Moritz Case**, the check for the taxes had never been cashed. The question whether, if it had been cashed, the payment of the taxes would have related back to the date of the check, was therefore not before the court, and was not decided. The question alone in that case was whether the payment of the taxes by check of the taxpayer discharged such taxpayer from further liability for taxes where the check was never cashed. That is not the question here, for there is no dispute in the evidence that, if the appellee paid his taxes by check, the check was cashed and the taxes were thereby discharged. There was no further liability therefore on the part of appellee. Conceding that appellee paid his taxes by check dated February 1, 1928, which the tax collector accepted, and which check was not cashed until the 9th day of that month, did the payment in that manner have the effect of discharging the taxes as of the date of February 1, 1928? We think this question must be answered in the affirmative. In the **Moritz Case**, it was held that the payment of taxes by check was a conditional payment. The general rule is that a check becomes absolute payment of a debt when the check is paid on presentation, and, on such payment, the debt is deemed to have been discharged from the date the check was given. 21 R. C. L. p. 70, § 69.

We see no reason why that principle should not apply to the payment of taxes, notwithstanding, as held in the Moritz Case, that payment of taxes by check is no payment at all until the check is paid, and that the tax lien continues up to that time. By the giving of a check, the tax obligation and the tax lien are both conditionally discharged, the condition being the payment of the check, and, when the check is paid, a discharge of both the tax obligation and the tax lien relates back to the date of the check. We think this view more reasonable than that contended for by the appellant. It is a matter of common knowledge that a very large proportion of the taxes paid in this state are paid by checks of the taxpayers, and are paid late in January, and that many of these checks do not reach the banks until the early days of February. A rule that would disfranchise such a great number of citizens of the state should be clearly the most reasonable rule. When taxes are paid on or before the 1st day of February by check, and the check cashed, the money goes into the public treasury, so what harm can result from such a method? We see none. If the check is never paid, the obligation still exists, and the tax lien goes with it."

In view of the foregoing decisions and authorities, it is my opinion that the date of payment of the tax in question was on March 12, 1941, when the check was received by the Department, and that the application for refund having been received by the Department on March 15, 1943, more than two years after such date, the application for refund should be denied.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 18, 1944.

Hon. Powell Hamner,  
Walker County,  
Jasper Alabama.

Clerks of Circuit Court—Sheriffs—Costs and Fees—Fine and Forfeiture Fund—Title 11, Section 83, Code of Alabama 1940.

The affidavit required by Title 11, Section 83, Code of 1940, does not have to be made before the judge who presided at the trial of the case, but may be made before the judge of the court in which the case was tried at the time when the sheriff or clerk appears to make the required affidavit.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of March 8, 1944, is as follows:

"Please give me your opinion as soon as possible just how I shall go about getting my claims against the Fine and Forfeiture Fund put in line for payment.

"Does Title 11, Section 83, mean that the Judge trying the case must sign the claims? We have, in the last year, lost Judge Lacy and Judge Blanton who were trial judges in Circuit Court in my county in a number of cases. Do the Circuit Judges who were appointed, by virtue of their offices, have the authority to sign prior claims?"

Title 11, Section 83, Code of Alabama 1940, referred to in your inquiry, provides in part as follows:

"§ 83. Costs, how taxed and collected.— \*\*\* (b) in all trials in the circuit court, or county court, or court of like jurisdiction—except justice of peace court and courts in lieu of justice of peace courts whose jurisdiction in criminal cases is limited to the jurisdiction of justice of peace courts, where the state fails to convict, or the indictment abates or is nolle prossed or withdrawn and filed, the fees of the sheriffs and clerks of the court and the state's witnesses shall be paid out of the fine and forfeiture fund, but the sheriffs and clerks must make affidavit before the judge of the court in which the case is tried of the amount due them; \*\*\* "

It is my opinion that the affidavit required by the statute does not have to be made before the judge who presided on the trial of the case, but may be made before the judge of the court in which the case was tried at the time when the sheriff or clerk appears to make the required affidavit.

The statute expressly provides that the affidavit must be made "before the judge of the court in which the case is tried." Nothing in the statute can be construed to require that the affidavit be made before the judge before whom the case was tried. Such a construction would operate to defeat the collection of fees by the sheriff or clerk to which they were legally entitled, and is clearly not the intention of the statute.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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March 20, 1944.

Hon. R. K. Greene,

Judge of Probate,

Hale County,

Greensboro, Alabama.

Code 1940, Tit. 12, §§ 4, 47, 52—County Treasurers—

1. In Counties where an individual has been appointed by the county governing body to act as treasurer pursuant to Code 1940, Tit. 12, § 52, and the treasurer so appointed has applied for and obtained appointment of a bank as a depository of county funds handled by him, pursuant to Tit. 12, § 4, the county governing body, in addition to any bond it may require such treasurer to make, should also "from time to time by resolution spread upon its minutes, make such requirements as may be deemed necessary for the safety of such funds so deposited, not inconsistent with the general laws of the state," in order to indemnify the county against loss that might arise in case of insolvency of the bank-depository.

2. Such requirements would be met by execution of an adequate bond or deposit of state or United States bonds in sufficient amount, as security, with the judge of probate, as provided in Tit. 12, § 47.

3. It is for the county governing body to determine what is adequate security in such cases, both as to amount and quality.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of March 4, 1944, is



as follows:

"A report by the examiners of the Commissioners Court of Hale County, on page 4, item 12 makes the following comment:

" 'Depository collateral was neither required nor requested of the Peoples Bank, the designated depository. We stress the importance of securing depository collateral, so as to comply with Section 47, Title 12, Code of 1940.'

"I am enclosing herewith an agreement made and executed between L. J. Lawson, County Treasurer of Hale County and the United States Fidelity and Guaranty Company. Will you kindly return an opinion as to whether this agreement fulfills the requirements set forth in above stated statute?

"I personally feel that the county is adequately protected by the treasurer's bond and this agreement. Please return this agreement with your opinion."

From your letters of March 4 and March 9 it appears that Mr. Lawson acts as Treasurer of Hale County pursuant to Code 1940, Title 12, Section 52, receives \$600 annually for his services and has made bond in the penal sum of \$35,000 with the United States Fidelity and Guaranty Company as surety for the faithful discharge of his duties. It does not otherwise appear what the terms and conditions are under which he acts as treasurer as provided by said Section 52.

It further appears that the county governing body has designated The People's Bank of Greensboro, of which Mr. Lawson is president, as a depository for funds handled by him as treasurer, pursuant, no doubt, to Section 4 of said Title 12. There is nothing to indicate that the governing body has made any requirements for the safeguarding of funds deposited in the bank as enjoined upon it by said Section 4.

The effect of Section 4 is to relieve the treasurer and his surety from liability for any loss that might occur by reason of insolvency of the depository bank. It will be seen, therefore, that unless provision is made otherwise than by requirement of an official bond from the treasurer the county may suffer loss upon failure of a depository bank, unless it has complied with that part of Section 4 which requires the governing body "by resolution spread upon its minutes, to make such requirements as may be deemed necessary for the safety of such funds so deposited, not inconsistent with the laws of the State."

So far as I am informed the county body up to this time has made no such requirements. What requirements should be made is a matter addressed to the sound judgment and discretion of the governing body. Where a bank pursuant to Section 47 of Title 12, acts as depository in lieu of a county treasurer as required by Section 43 of said Title 12, the governing body must require the bank to secure the safety of deposits either by an adequate bond or in lieu of such bond by deposit of "bonds of the State of Alabama or bonds of the United States of America in a like amount, to be held as security, same

to be deposited with the Judge of Probate with the same liability thereon as on official bonds."

This statute furnishes some guide at least, or analogy for guidance of the governing body in determining what kind of security should be required of a depository bank designated under Section 4, *supra*. It cannot, however, be said to be binding inasmuch as it applies in express terms only to banks acting as depository treasurers under Sections 42 *et sequitur*.

You have submitted an agreement, dated January 10, 1940, between Mr. Lawson, the United States Fidelity and Guaranty Company, the People's Bank of Greensboro and the First National Bank of Birmingham, from which it appears that the People's Bank has delivered to the Birmingham Bank securities valued at \$43,925, to be held by the latter in escrow for protection or indemnity against any loss to the surety and Mr. Lawson that might arise upon his official bond as acting county treasurer. The agreement, however, is a private agreement, to which neither the State nor the county is a party, and on account of Section 4 of Title 12, neither Mr. Lawson nor his surety would suffer loss in case of insolvency of the People's Bank inasmuch as the People's Bank has been designated by the county board as depository for Mr. Lawson's official funds.

It would seem, therefore, that some provision should be made, the nature of which must be determined by the county governing body itself, for protection of county funds deposited in People's Bank by Mr. Lawson as Acting Treasurer in case of insolvency of the Bank.

This same situation was considered in an opinion of this office dated March 9, 1938, to Mrs. Frank C. Turner, Judge of Probate, Washington County, (Biennial Report Attorney General 1936-38, page 566). That opinion is in accord with the views hereinabove expressed.

I am returning the agreement between Mr. Lawson and others, dated January 10, 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 20, 1944.

Hon. T. R. Harrison, Mayor,  
City of Decatur,  
Morgan County,  
Decatur, Alabama.

City of Decatur may print names of candidates for municipal offices on ballots where such candidates are nominated and qualify with the mayor or other chief executive of the city not less than twenty days prior to the election.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of March 1, 1944, is as follows:

"The City of Decatur would like to have an official opinion as to the time when candidates for election to the municipal offices in the City election, to be held on the third Monday in September, 1944, must qualify as candidates.

"Section 26 of Title 37 of the Code of Alabama of 1940 provides, among other things, that elections in Cities and Towns of this State shall be conducted according to the general election laws.

"Section 27 of Title 37 of the Code of Alabama of 1940 provides that the regular municipal elections in Cities and Towns shall be held on the third Monday in September, 1940, and quadrennially thereafter.

"Section 145 of Title 17 of the Code of Alabama of 1940 provides, among other things, that there shall be printed upon the ballots the name of any qualified elector who has been requested to be a candidate for any municipal office by written petition signed by at least twenty-five electors qualified to vote in the election to fill said office, when such petition has been filed before the first Tuesday in May in the year in which a State-wide Primary election is held.

"We have never had Party Primaries in our City of Decatur elections. All of the candidates for Mayor and members of the City Council (being the only offices we fill by election) are nominated by petition signed by at least twenty-five voters. It has been the practice for many years in Decatur to accept such nominations and print the names of the candidates on the ballots if the nominations are filed with the City Council not less than twenty days previous to the day of election.

"Please advise us whether we can print the names on the ballots of candidates nominated by petition filed not less than twenty days previous

to the day of election."

It is necessary to examine the legislative history of Title 17, Section 145, Code of 1940, to determine its applicability to the facts outlined in your letter. Most of the provisions of this Section appeared as Section 462, Code of 1923. However, in the latter the candidate for a municipal office was required to file his petition with the judge of probate not more than sixty and not less than twenty days previous to the election. The 1935 Acts of the Legislature, p. 894, amended Section 462, Code of 1923, the provisions affecting municipal elections being as follows:

"The judge of probate shall also cause to be printed upon the ballots the name of any qualified elector who has been requested to be a candidate for any state, county or municipal or federal office by written petition signed, in case of a candidate for a state or federal office, by at least three hundred electors, and in case of a county or municipal office by at least twenty-five electors qualified to vote in the election, to fill said office; when such petition has been filed with him before the first Tuesday in May in the year in which a state-wide Primary Election is held. . . ."

The pertinent provisions of Title 17, Section 145, Code of 1940, are as follows:

"The judge of probate shall also cause to be printed upon the ballots, the name of any qualified elector who has been requested to be a candidate for any county or municipal office by written petition signed by at least twenty-five electors qualified to vote in the election to fill said office, when such petition has been filed with him before the first Tuesday in May in the year in which a state-wide primary election is held."

In dealing with the preparation of the ballot the same Section provides for printing thereon the names of candidates who have been nominated "by any caucus, convention, mass meeting, primary election, or other assembly." Specific provisions, inconsistent with this Section, as to candidates in primary elections, are found in Sections 336, et seq., Title 17, Code of 1940, and particularly Section 344.

Title 17, Section 1, Code of 1940, provides:

"All the provisions of this article (which includes Section 145) shall apply to all primary elections and all elections by counties or municipalities held in this state, except in cases where the provisions hereof are inconsistent or in conflict with the provisions of a law governing special primary, county or municipal elections."

We also call attention to the fact that primary elections, when held at the expense of the state or counties, except special primary elections, must be held on the first Tuesday in May, 1940, and on the first Tuesday in May every two years thereafter. Title 17, Section 340, Code of 1940. We also point out that under the above, a candidate for municipal office would be able to file his petition with the judge of probate late in the afternoon of the day preceding a primary election, and, as a practical matter, it would be impossible for the judge of probate to have time to include such candidate's name

on a printed ballot and deliver same to the election officials at the opening of the polls the following morning. The above considered, it is my interpretation that when municipal elections are held at the same time as general elections, the legislature intended that candidates for municipal offices should file their petitions with the judge of probate prior to the primary election, and that the name of such candidate should be printed on the general election ballot but not on the primary ballot.

When a municipal election is held at a time different from a state wide general election, the candidates do not qualify with the judge of probate but with the mayor or other chief executive of the city or town, under the provisions of Title 17, Section 171, Code of 1940, which is as follows:

"In case of any municipal election held at a time different from a general state or federal election, the duties herein prescribed for the judge of probate in respect to receiving nominations, printing and distributing ballots and cards of instructions shall be discharged under the same sanctions by the mayor or other chief executive of the city or town."

It is my understanding that the City of Decatur holds its elections on the third Monday in September, quadrennially after 1940, under the provisions of Section 27, Title 37, Code of 1940. If correct in this assumption, such elections are held at a time different from the general state or federal elections, and the candidates should file their petitions with the mayor or other chief executive of the City of Decatur, and not with the judge of probate. See Biennial Report of the Attorney General, 1934-1936, page 765; Quarterly Report of the Attorney General, Vol. 14, page 173.

In *Rainwater, et al v. State, ex rel., Strickland, et al*, 237 Ala. 315, 187 So. 484, 121 A. L. R. 981, the Supreme Court held that the statutory time for holding a municipal election was directory, and while Justice Brown did not refer to the qualification of the candidates, nor to their nominations, the original transcript included copies of the minutes of the meetings of the town council of the Town of Childersburg authorizing the election. (Supreme Court Record 3687.)

The minutes of the council meeting held on August 2, 1938, indicated the following:

"Motion by J. L. Keith and seconded by J. A. Nichols that the Town of Childersburg have an election of a Mayor and five councilmen whose term shall begin on the 1st day of October, 1938, and expire the 30 day of September, 1940. Candidates must qualify between the date of August 20 and August 31 by appearing before the Town Clerk."

The minutes from a special session of the town council held on September 3, 1938, indicate the following:

"This meeting was held for the purpose of completing plans for a town election to be held on September 19, 1938, for the purpose of electing a mayor and five councilmen, whose term will commence October 1st, 1938, and expire September 30, 1940. Candidate who had qualified at the expiration of the qualification date were as follows:

"For Mayor: M. J. Cllett and Wallace Boaz.

"For Alderman: J. A. Strickland, J. A. Nichols, S. P. Deloach, Henry Moody, L. J. Keith, J. F. (Buck) Thompson, W. H. Veasey, E. A. Rainwater.  
\*\*\* "

It is important to note that the Childersburg election was held, and the decision rendered, after the enactment of the above quoted provision of the Acts of 1935, which is not materially different from the present provision of Section 145, supra.

In view of the above, it is my opinion that the requirement of the time in which a candidate for municipal office in Decatur may be nominated is directory and not mandatory, and, therefore, the City of Decatur may print the names of the nominated candidates on the ballots when their petition is filed at the time designated. It is assumed, however, that prior to such election, the council will adopt a resolution providing for the nomination of such candidates and for the election.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 22, 1944.

Hon. Wm. Varner,  
Judge of Probate,  
Macon County,  
Tuskegee, Alabama.

LOCAL LAWS—

COUNTY SUPERINTENDENT OF EDUCATION FOR MACON  
COUNTY.

1. The Local Act of the Legislature of 1935, page 38, provides that candidates for the office of County Superintendent of Education for Macon County shall be nominated and elected as candidates for other county offices for Macon County are nominated and elected under the general laws of this State regulating primary and general elections.

2. Code, Title 52, Sections 102-108 neither repeal nor modify this local act for Macon County but simply applies to counties not controlled by local legislation.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of March 16, 1944, is as follows:

"In 1927 the School Code was passed, it now being incorporated in Title 52 of the Code of 1940. Paragraph 105 provides for means of re-submission of election of Superintendent through the Democratic Executive Committee (as to this County), etc., Paragraph 106 provides for submission to the Qualified electors of the proposition of selection of Superintendent by Board of Education in any Primary.

"1. Is the inclusion of the proposition on the Primary Election Ballot dependent on the Certification to the Judge of Probate that the Democratic Party desires to leave the selection of the Superintendent to the County Board of Education as provided for in said paragraph 105?

"The legislature by Local Act, Local Acts of Ala. 1935, page 38, provides for election of the Superintendent of Education by the qualified electors of said county—(See Section 5 of said Act.)

"2. Under this Act is it the duty of the Judge of Probate to submit on the Primary Election Ballot with the names of the candidates the proposition, 'For Selection by the County Board of Education'?

"I will appreciate your early response since this matter has been demanded of me and I must prepare the ballot for early delivery."

The real question propounded by you is, Has the local law dealing with the nomination and election of the County Superintendent of Education for Macon County been repealed or amended by Title 52, Sections 102-108?

The local Act referred to states its purpose in its title as follows: "To provide for the election of County Superintendent of Education for Macon County, Alabama, by the qualified electors thereof, and to prescribe the duties and qualifications, and to fix the term and compensation of such officer."

Section 2 of this Act provides that candidates for the office of County Superintendent of Education "shall be nominated and elected as candidates for other offices of Macon County, Alabama, are nominated and elected under the general laws of this State regulating primary and general elections."

It is the established rule of statutory construction in this State, as well as other states, that there must be a clear manifestation to repeal the local law by the general statute. That general laws dealing with a subject are not to be construed as repealing special laws dealing with the same subject. **Ex Parte Central Iron and Coal Company**, 209 Ala. 22; **Mobile and Ohio Railroad Company v. State**, 29 Ala. 573.

If there is an apparent conflict the general law yields to the local statute. **Downing v. City of Russellville**, 241 Ala. 494.

It is quite obvious that the local act requires that in Macon County the County Superintendent of Education shall be elected for a term of four years and that he shall be both nominated and elected as all other county officers of Macon County are nominated and elected under the general laws of this State regulating primary and general elections. It is equally apparent that Sections 102-108, Title 52, of the Code, are not dealing with the County Superintendent of Macon County and evince no purpose to repeal the Local Act on that subject. In short, the sections of the Code referred to are legislating with reference to counties having no local law on that subject.

Code, Title 17, Sections 336-344 et sequi control primary elections of county officers of Macon County.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.



March 23, 1944.

Hon. S. E. Boozer,  
Judge of Probate,  
Calhoun County,  
Anniston, Alabama.

Code 1940, Tit. 17, § 38—Poll Tax—List of Qualified Electors—

1. Upon making the list of qualified electors entitled to vote required by Code 1940, Tit. 17, § 38 to be made and published by the Judge of Probate he is authorized to determine whether a registered elector whose name does not appear on the Tax Collector's list of persons who have paid poll taxes, has in fact paid poll tax. Such determination may be made from available information other than the tax collector's list and duplicate receipts, but should be based upon proper legal proof such as would be admissible in a court of law, and must reasonably satisfy the judge of probate that payment was made.

2. Payment of poll tax means not only an offer or tender of payment by the taxpayer but also actual receipt or acceptance of payment by the Tax Collector.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of March 15, 1944, is as follows:

"I am giving you a case in brief that I have that has come up this is the second time, and want you to tell me as soon as possible your ruling.

"I have a party who finds their name is not on the poll list for this year, and he insists that he has paid same, and goes so far as to make a sworn affidavit that he did pay the same on a certain date, but does not remember getting a receipt for same. The Tax Collector, of course, has no receipt, but admits that it could have happened. Of course, it is too late to pay poll tax since February first was the last date.

"I would like for you to tell me what to do in a case of this kind."

Poll Tax receipts stubs, or duplicates, required to be kept by tax collector's for each year are presumptive evidence of the facts therein recited. Where they do not affirmatively show that a voter has paid his poll tax for a particular year, "it will be presumed, *prima facie*, that such tax has not been paid." *Shepherd v. Sartain*, 185 Ala. 439, 452 (4), 64 So. 57.

It is noted that the presumption is *prima facie*, only, and may therefore

be rebutted by satisfactory proof of payment. The burden of proof in such cases is upon him who maintains that he has paid the tax.

Ordinarily, the most satisfactory proof of payment would be the tax collector's receipt or the duplicate receipt kept by him pursuant to Code 1940, Tit. 51, §§ 239, 241. In the absence however of such records it would seem to be competent for the judge of probate from "other available information" to ascertain what persons "have paid all poll tax due." Code 1940, Tit. 17, § 38.

By that statute he is required to publish on or before April 15, and to certify, "the correct list of all qualified electors," and to give notice also "that any voter duly registered whose name has been inadvertently or through mistake omitted therefrom and who has paid all poll taxes due and who is legally entitled to vote shall have ten days from said publication to have his or her name entered upon said list of qualified voters."

"If within such ten days any voter shall reasonably satisfy said judge of probate by proper proof that any name should be added to such list, his or her name shall be added thereto." Title 17, § 38, supra.

Whether the voter's name has been "inadvertently or through mistake omitted" from the list, and whether the voter has or has not paid "all poll tax due," are questions of fact to be decided by the judge of probate from "available information" by proper proof, and to his reasonable satisfaction. It may be assumed I think that "proper proof" means such proof as would be admissible in a court of law to determine an issue of fact. Clearly heresay or opinion evidence, or a matter *res alios acta* would not be proper proof.

Thus, in *Shepherd v. Sartain*, supra, on page 458, par. 20, it was said: "where the records negatively show the nonpayment of a voter's poll tax, the mere fact that the voter sent the money to be paid by another person, or left it with him with that understanding, is no evidence that it was paid."

On the other hand in that same case (p. 457, par. 18) it was held that "poll tax receipts, though shown to be in existence, are not the best evidence of the fact of such payments, in such sense as to forbid parol proof thereof." " \*\*\* payment is a substantive independent fact of which the receipt is merely one form of evidence, and proof of the original fact is in no sense proof of the contents of the receipt." (p. 458).

Said the court also in that case: "There are, indeed, cogent reasons for requiring proof of poll tax payments to be made exclusively by record or documentary evidence, but the Legislature has not seen fit to so ordain." (p. 458). That case was decided in 1913, but I am unable to find that the Legislature has departed from the rule then obtaining or adopted the suggestion of the court. On the contrary the judge of probate is still authorized from "other available information," (other than the poll tax receipts and tax collector's lists) to ascertain "who have paid all poll tax due," and to revise the lists of qualified electors accordingly. Tit. 17, § 38.

The fact of payment implies not only a tender or offer to pay but also receipt or acceptance by the payee of the thing tendered or offered in pay-

ment. From your statement of the facts in the present instance the tax collector neither admits nor denies that payment was made, "but admits that it could have happened."

It is for you to determine therefore in the light of what has been said and from such proof as has been submitted: (1) Whether the proof is proper in the sense I have explained; and, (2) whether after consideration of such proof as you deem proper in that sense, you are reasonably satisfied that the applicant tendered or delivered to the tax collector the poll tax due by him, and that the tax collector accepted or received the same. Unless you are so reasonably satisfied your duty would be to decline to add the applicant's name to the list of qualified electors. The question is one of fact in the solution of which I cannot aid otherwise than as already stated, and one which I cannot decide for you. I have tried however to set out for your guidance a statement of principles of law which you may apply in reaching a decision.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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March 23, 1944.

Hon. L. C. Walker,

Judge of Probate,

Shelby County,

Columbiana, Alabama.

Code 1940, Tit. 51, §§ 618, 619—Mortgage and Deed Filing Taxes—  
Purchase Money Mortgage—

Mortgage of real property to secure unpaid balance of purchase money due for said property, although it recites that fact, is not subject to tax imposed by Code 1940, Tit. 51, § 618.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of March 15, 1944, is as follows:

"Re: File 3526

"We are in receipt of the copy of your letter dated March 10, 1944, to Mr. R. C. Gonzalez with the Tennessee Coal, Iron & Railroad Co. of

Birmingham, Alabama.

"We are enclosing a copy of the instrument in question and will ask that you please render an official opinion regarding the deed tax on the instrument as your letter is not an official opinion and it will be necessary for us to have this or the State Examiners will charge this tax back to us when we are examined as they have done in the past. We would like to call your attention to the fact that the mortgage is a purchase money mortgage securing the balance of the unpaid purchase money and that the deed has not been offered for record.

"We will thank you to give us this opinion as early as possible so that we may get this matter straightened out for all future computations."

The instrument of which a copy is submitted for examination is a mortgage executed February 24, 1944, by Isaac W. Cross to Tennessee Coal, Iron and Railroad Company to secure unpaid purchase money due by him for and on account of conveyance to him by said company of land therein described by deed dated January 12, 1944. The mortgage has the usual provisions for foreclosure either by power of sale or in equity.

Recital in the mortgage of the fact that it secures unpaid purchase money does not operate as conveyance of any title or interest by the mortgagee to the mortgagor.

The mortgage can in no sense be said to comply with the provisions of Code 1940, Title 47, Sections 22-23, which are necessary in order to convey legal title in real property. It conveys no title or interest whatever except to the mortgagee.

The case of **Thompson, Probate Judge, v. Smith**, 174 So. 796, 797, is without application. The point of decision in that case was that a conditional sales contract operated not only to secure unpaid purchase money by retention of legal title in the vendor but also conveyed an interest in property to the vendee and was, therefore, subject to both the so-called mortgage filing tax and the deed filing tax. Code 1940, Title 51, Sections 618-619. The various opinions of this office, to which you refer in your letter of March 7, 1944, to Mr. R. C. Gonzales, are based on this case and the doctrine of that case can by no stretch of the imagination be extended to the ordinary form of mortgage securing unpaid purchase money due upon conveyance of real estate evidenced by a separate instrument.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 24, 1944.

Hon. Ben P. Singleton,  
Chief Examiner of Public Accounts,  
Department of Finance,  
Montgomery, Alabama.

Costs and Fees—Ex-Officio Clerk, Sheriff and Witnesses, Inferior Court—Chilton County—Preliminary Hearings—Local Acts 1939, page 228.

Generally, and specifically as to the inquiries herein, there is no authority for the payment of fees and costs in a preliminary hearing other than those provided in Title 11, Sec. 84, 1940 Code of Alabama.

Opinion by Assistant Attorney General Lurie.

Dear Sir:

Your request for an official opinion, bearing date of November 22, 1943, is as follows:

"Please refer to Local Act No. 335, page 228, Local Act of 1939, and advise me in answer to the following:

"1. What fees are legally and properly taxable and collectible for services rendered by the Ex-Officio Clerk of the Inferior Law Court of Chilton County, Alabama, on **preliminary hearings** where:

"(A) Defendant on preliminary hearing is bound over to await the action of the Grand Jury, is indicted and subsequently acquitted?

"(B) Defendant on preliminary hearing is bound over to await the action of the Grand Jury, is indicted and subsequently convicted?

"(C) Defendant on preliminary hearing is discharged?

"(D) Defendant on preliminary hearing is adjudged to be a Juvenile and cause transferred to Juvenile Court?

"(E) Defendant on preliminary hearing is bound over to await the action of the Grand Jury and a No Bill is returned by that body?

"2. If any fees are legally and properly taxable for services rendered by said Clerk in such preliminary hearings, are they legally and properly payable from the Fine and Forfeiture Fund of Chilton County in the following instances:

"(A) Defendant on preliminary hearing is discharged?

"(B) Defendant on preliminary hearing is bound over to await the action of the Grand Jury, is indicted and subsequently acquitted?

"(C) Defendant on preliminary hearing is adjudged to be a Juvenile and cause transferred to Juvenile Court?

"3. What schedule of fees are legally and properly taxable for witnesses in preliminary hearings in said Court?

"4. Are fees of witnesses legally and properly payable on preliminary hearings by:

"(A) Department of Corrections and Institutions where defendant is sentenced to Hard Labor or Penitentiary?

"(B) From Fine and Forfeiture Fund where defendant discharged on preliminary hearing?

"(C) From Fine and Forfeiture Fund where defendant is bound over to await the action of the Grand Jury and a No Bill is returned by that body?

"(D) From Fine and Forfeiture Fund where defendant is bound over to await the action of the Grand Jury, is indicted and subsequently acquitted?

"5. Should a final record be made by said Clerk in such preliminary hearings in said Court and taxed and collected from any State or County Fund in any instance?

"6. Are fees for services rendered by the Sheriff in such preliminary hearings in said Court legally and properly payable from the Fine and Forfeiture fund:

"(A) Where defendant is discharged on preliminary hearing?

"(B) Where defendant is adjudged to be a Juvenile and cause transferred to Juvenile Court?

"(C) Where defendant is bound over to await action of Grand Jury and a No Bill is returned by that body?

"(D) Where defendant is bound over to await action of Grand Jury, is indicted and subsequently acquitted?

"Many of the above questions have more or less been answered in other opinions dealing with other courts and situations. However, we believe it will be of much help to the Chilton County officials affected and to us, in our work, for you to give us specific answers to the above in the light of the specific local law concerned."

In order to properly determine the numerous interrogatories propounded in your request, it is essential to determine under what provisions of law fees are taxable as a result of a preliminary hearing in the Inferior Law Court of Chilton County, Alabama. There is no better place to start the search for the answer to that question than in the Act creating the Inferior Court itself. Your attention is invited to those parts of Act No. 335, Local Acts of Alabama, 1939, page 228, pertinent to the issues presented in your request as follows:

"Section 1. That there be and it is hereby established in the County of Chilton an Inferior Law Court which shall be called the Inferior Law Court of Chilton County and which shall be a Court of record and shall have and exercise concurrent jurisdiction, authority, functions and powers now conferred or which may hereafter be conferred upon the several circuit courts of the State of Alabama where the amount involved, exclusive of the interest and costs, do not exceed three hundred (\$300.00) dollars, and shall have and exercise jurisdiction of all misdemeanors and all offenses arising or committed in Chilton County under Chapter 100, as amended, and Chapter 150, as amended, of the Code of 1923; provided, however, that the Inferior Law Court of Chilton County shall not have jurisdiction to try persons charged with felonies; and shall have concurrent jurisdiction with the Justices of Peace of Chilton County in all matters whatsoever."

"Section 3. That the Clerk of the Circuit Court of Chilton County shall be ex-officio clerk of said court and shall have the powers and discharge the duties, which will devolve upon the Clerk of the Circuit Court, and shall be subject to the same pains and penalties with regard to the duties of this office and shall be entitled to the same fees in cases wherein the amount involved is more than \$50.00 as are now or may hereafter be allowed to Circuit Court Clerks of Alabama and in cases where the amount involved is \$50.00 or less the same fees as are now or may hereafter be allowed Justices of the Peace, and the same shall be collected as such fees are collected in the Circuit Court. \*\*\* "

"Section 4. \*\*\* The sheriff shall receive the same fees for executing the processes of this Court as provided by law for the execution of the same processes in the Circuit Court or in the Justice of the Peace Court, and shall be collected in the same way as is now or may hereafter be provided by law."

"Section 8. The witnesses attending upon said Court shall be entitled to, and paid the same fee as are paid the witnesses in the Circuit Courts of Chilton County."

"Section 9. That there shall be taxed against the defendant on conviction the same solicitor's or County Solicitor's fee and the same shall be collected in the way provided by law for taxing and collecting solicitor's fees in the Circuit Court and when collected shall be paid into the Treasury of Chilton County, Alabama."

"Section 10. That the procedure, practice, and rules governing the Circuit Courts of Alabama shall in all things apply to and govern the procedure and practice in said Court of Chilton County, except as herein otherwise provided."

A consideration of these provisions herein set out, together with the design, purpose, and scope of this Inferior Court, created to take the place of the County Court of Chilton County, with increased jurisdiction, leads to the firm conclusion that the Act does not contemplate such fee and costs and in no manner attempts to regulate them, and the fees applicable in the preliminary hearings in this court are governed by the general laws applicable to such, and that the Judge of this Inferior Court on preliminary hearings sits merely as "committing magistrate".

Thus it may be seen that, as no reference to preliminary hearings is made therein, we can glean no material aid from the provisions of said Act 335, supra, in determining the answers to your numerous questions.

The answer to each of the questions propounded, with the exception of question number three, is in the negative, and no costs or fees are payable to the ex-officio clerk of the Inferior Law Court of Chilton County on preliminary hearings from the fine and forfeiture fund, or, from any fund other than a fee of \$2.00 which may be paid to said clerk provided the same is collected from the defendant—(Title 11, Section 91, 1940 Code of Alabama), nor are any fees payable to witnesses or to the sheriff for services in such hearings from the fine and forfeiture fund, or from the Department of Corrections and Institutions.

To avoid repetition in presenting the authorities for each conclusion reached in the eighteen questions submitted, and to conserve time and space, and, in view of the fact that these questions are interlocking and in some instances overlapping, the following authorities, upon which this opinion rests, are so grouped:

#### Opinions of Attorney General

Quarterly Report—Volume 32, Page 67, 106

Quarterly Report—Volume 28, Page 135

Quarterly Report—Volume 14, Page 66

Biennial Report—1926-28, Page 702

Biennial Report—1918-20, Page 523

Biennial Report—1920-22, Page 348

Biennial Report—1932-34, Page 165

Quarterly Report—Volume 30, Page 119

Quarterly Report—Volume 17, Page 43

Quarterly Report—Volume 19, Page 246



Quarterly Report—Volume 29, Page 13, 24

Biennial Report—1934-36, Page 664

Quarterly Report—Volume 22, Page 207

Quarterly Report—Volume 21, Page 53

Quarterly Report—Volume 18, Page 88

Quarterly Report—Volume 6, Page 105

Quarterly Report—Volume 16, Page 126

Quarterly Report—Volume 9, Page 9

Quarterly Report—Volume 11, Page 131

Quarterly Report—Volume 25, Page 172

1940 Code of Alabama

Title 45, Section 69, 72

Title 11, Section 79, 83, 84, 91, 103-114

Title 15, Section 127, 151, 169, 393, 292

Title 13, Section 383

General Acts of Alabama, 1937, Page 268; and, Hawkins ex rel F. B. O'Brien vs State 124, Ala. 102; Lee vs Smyley 16 Ala. 773; Dent vs State 42 Ala. 514; Green County vs Hale County 61 Ala. 72; Troup vs Morgan County 109 Ala. 162, 192 So. 503; State vs Stone 223 at page 243 171 So 366; Herring vs Griffin 211 Ala. 225, 100 So. 202; Bilbro vs Drakeford 78 Ala. 318; Kilgore vs Swindle, County Treasurer, 219, Ala. 378, . . . 122 So. 333; Pollard vs Brewer 59 Ala. 130; McElderry vs Abercrombie 213 Ala. 289; Swindle vs. Cracker, 217 Ala. 199, 115 So. 252

Question No. 3 having been answered herein no specific reference is deemed essential.

All prior opinions rendered by this office are modified to conform to the conclusions expressed herein.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 28, 1944.

Hon. Isaac Johnson, Jr., Chairman,  
Lawrence County Court of Revenues,  
Moulton, Alabama.

Code 1940, Title 12, §§ 43-51, 53; 92-109; Title 37, § 265—County Depositories—County Sinking Funds—

1. In counties where a bank or trust company acts in lieu of county treasurer one bank or trust company only may act as such county depository.

2. In such counties sinking funds created and maintained to retire county bonds issued under Code 1940, Title 12, Sections 93 et sequitur, may be deposited with some other bank on interest instead of being invested in certain securities, as authorized by Code 1940, Title 37, § 265.

3. In such counties there may be as many as three different kinds of depositories, to-wit: depository acting in lieu of county treasurer, depository for sinking funds, and depository designated upon application of county officers for deposit of funds coming into their hands as authorized by Title 12, Section 4.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of March 22, 1944, is as follows:

"Would appreciate your opinion on the following question:

"In title 12, sec. 43 and sec. 44, relative to depositories and the selection thereof, for County funds, in lieu of a County treasurer, found in the 1940 Code of Alabama.

"When the County Governing Body selects a depository, under the above mentioned title and sections; Is it lawful to select more than one depository, or is it lawful to select one depository for one fund, and another depository for another fund.

"For instance, the Lawrence County Court of Revenues or Governing Body of Lawrence County selected the Bank of Moulton for all of the County funds, except one fund, which is known as the Courthouse Bond Retirement Fund, and they selected the Citizens Bank as depository for that fund.

"In sec. 43 mentioned above, it is provided that in certain instances, there shall be established a County depository, the depository to be so established, is designated by the indefinite article "A", which apparently

would indicate one depository in lieu of one treasurer.

"There is no local law governing the above for Lawrence County."

In counties with a population of 56,000 or less according to the 1930 Federal Census the office of county treasurer has been abolished and in lieu thereof the county governing body is required on or before the first Monday in December each year to select "a county depository in lieu of a county treasurer," which functions during the next succeeding calendar year as county treasurer to a limited extent. Code 1940, Title 12, Sections 43-51, 53.

I find no provision of law other than the foregoing for establishment or selection of a county depository in lieu of a county treasurer and I am of opinion therefore that only one such county depository is authorized by law.

On the other hand, where a county issues bonds pursuant to Title 12, Sections 92-109 for any of the purposes enumerated in Section 93, such as construction of courthouses, jails, poor houses, etc. the county may establish a sinking fund for the redemption or retirement of such bonds and in such cases the sinking fund may be "deposited in bank on interest," as provided in Section 265, of Title 37. Said Section further provides as follows:

"All sinking funds created by resolutions or ordinances heretofore adopted must be properly set aside each year in accordance with the resolution or ordinance providing for the same, and a report made thereof and filed \*\*\* with the probate judge of the county \*\*\* showing in detail how said sinking fund is invested or **deposited**." (Emphasis added).

These provisions for investment or deposit "in bank on interest" are entirely independent and separate from provisions for appointment of a county depository in lieu of a county treasurer. I assume that the "Courthouse Bond Retirement Fund" to which you refer as deposited in the Citizens Bank is a sinking fund created and maintained in connection with courthouse bonds heretofore issued pursuant to Title 12, Section 93 or the statute thereby codified. On that assumption it is entirely legal and proper that the Citizens Bank should act as such depository, and that the Bank of Moulton should act as county depository in lieu of county treasurer for deposit and disbursement of general funds of the county and such other special funds as the county is entitled to.

It may not be amiss also to call attention to still another type of county depository created under Code 1940, Title 12, Section 4, whereby certain county officers, such as tax collectors, treasurers, probate judges, etc. may request the county governing body to designate a depository wherein they may deposit county funds coming into their hands and be thereby relieved of any liability that might arise on the part of themselves or their sureties upon insolvency of the bank or trust company selected as such depository by the county governing body. This provision of law is separate and apart from the provisions heretofore referred to and is not to be confused with them or either of them.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 30, 1944.

Hon. John B. Sockwell,  
Judge of Probate,  
Colbert County,  
Tuscumbia, Alabama.

Counties—Court of County Commissioners—Expenditures—Title  
12, Section 123, Code of Alabama 1940.

The county may legally purchase for use in the offices of the Judge of Probate and Tax Collector a list showing in numerical order the automobile licenses issued in a county for a license year, the name and address of the car owner, the motor number and kind of car.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of March 3, 1944, is as follows:

"A List made from records on file at the State Capitol showing in numerical order the automobile license issued in Colbert County, Ala., for the year 1943 and also showing the name and address of the car owner, the kind of car and the motor number, has been compiled by Cadden Advertising Agency of Montgomery, Ala. This list is very useful and convenient to the County Tax Assessor in assessing automobiles and to the Probate Judge in issuing the license or transferring license. I find that the use of this list saves the Tax Assessor and the Probate Judge much time and work in securing ready information at a time when they are rushed. It also enables these officials to be more accurate in getting complete information.

"On account of this list being so helpful to these officials in the transaction of their duties in issuing license I think it would be good business for the county to bear the expense of providing the list for these county officials.

"Please advise me whether the county can legally supply the Probate Judge and the Tax Assessor with this kind of office supplies."

It is my opinion that your inquiry should be answered in the affirmative.

Title 12, Section 123, Code of Alabama 1940, provides in part as follows:

"§ 123. Stationery of officers paid for by county.—The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, \*\*\*."

The list referred to in your inquiry is a suitable book within the meaning of the term "suitable books" in the above set out section. For this reason such list may be legally purchased by the county for use in the offices of the Judge of Probate and Tax Assessor.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

# Quarterly Report, Attorney General

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